March 26, '66 - Reversed Davis 6 87

SUPREME COURT OF THE UNITED STATES.

No. 254. 169. 84. 55. 52. a 37.

JAMES K. SIMPSON, ROBERT SIMPSON, JAMES SEVIER, WILLIAM SIMPSON, JAMES M. DUFF AND WILLIAM K. REYNOLDS, PLAINTIFFS IN ERROR,

vs.

AUSTIN DALL, JOSEPH E. DALL AND DANIEL P. GIBBON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

CCLIV. GIDEON, Printer, 511 Ninth Street, D.C.

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No. 254.

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VS.

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[REC. CCLIV, D. T., 1860.]

Writ of Error.

UNITED STATES OF AMERICA.

The President of the United States to the Honorable, the Judges of the Circuit Court of the United States, holden at Knoxville, for the District of East Tennessee, Greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in said Circuit Court, before you, between Austin Dall, Joseph E. Dall, and Daniel P. Gibbon and James K. Simpson, Robert Simpson, James Sevier, William Simpson, James M. Duff and William K. Reynolds, a manifest error hath happened, to the great damage of the said James K. Simpson, Robert Simpson, James Sevier, William Simpson, James M. Duff and William K. Reynolds, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to law and custom of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this, the 26th [L. S.] day of May, 1860, and in the eighty-fourth year of the Independence of the United States.

NATHAN GAMMON,
Clerk.

Citation.

United States of America.

To Austin Dall, Joseph E. Dall, and Daniel P. Gibbon, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a Writ of Error, filed in the Clerk's Office of the Circuit Court of the United States at Knoxville, in the District of East Tennessee, where in James K. Simpson, Robert Simpson, James Sevier,

William Simpson, James M. Duff, and Robert K. Reynolds, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable West H. Humphreys, Judge of the District Court of the United States for the District of East Tennessee, and now sitting and holding the Circuit Court of the United States in said District at Knoxville, on this the 26th day of May, A. D. 1860.

W. H. HUMPHREYS,

Judge of the District Court of the U. S. for the District of East Tennessee, and now holding the Circuit Court for said District.

Service.

Came to hand on 20th May, 1860, and executed same, by making known its contents to James R. Cocke, one of the attorneys for the defendants in error, also handing him copy of citation.

WM. W. LOWRY,

U. S. Marshal for Eastern District of Tennessee.

May 26, 1860.

Knoxville, Tennessee.

Transcript from the Circuit Court of the United States for the Eastern District of Tennessee, of the proceedings had in the following cause in said Court, taken by appeal to the Supreme Court of the United States, at Washington City, in the District of Columbia, to wit, Dall, Gibbins & Co. *vs.* Simpson Brothers, Duff & Co.

Austin Dall, Daniel P. Gibbons and Joseph B. Dall,
vs.
James K. Simpson, Robert Simpson, James M. Duff, James Sevier and William K. Reynolds.

Bond.

District of East Tennessee:

Know all men by these presents, that we, Dall, Gibbons & Co., and William E. Cocke, jr., are jointly and severally bound unto Simpson Brothers, Duff & Co., in the penal sum of five hundred dollars, to be void on condition that the said Dall, Gibbons & Co.,

do with effect prosecute the suit by them this day commenced in the Court of the United States for the Eighth Circuit in the District of East Tennessee, against the said Simpson Brothers, Duff & Co., otherwise pay all costs and damages which may be awarded for failure therein. Witness our hands and seals this 12th day of April, 1859.

(Attest,) DALL, GIBBONS & CO., [SEAL.]
Per COCKE, *Atto.*

WILLIAM E. COCKE, JR., [SEAL.]
Per JAMES R. COCKE.

Summons.

The President of the United States, to the Marshal of East Tennessee District, Greeting:

You are hereby commanded to summons James K. Simpson, James Sevier, William Simpson, John A. Simpson, Robert Simpson, James M. Duff, and William K. Reynolds, partners in trade, under the firm, name and style, of Simpson, Brothers, Duff & Co., to appear before the Honorable the Judges of the Court of the United States for the Eighth Circuit, in the District of East Tennessee, at the Court House, in Knoxville, on the third Monday of May next, to answer Austin Dall, Joseph E. Dall, and Daniel P. Gibbons, partners in trade under the firm, name and style of Dall, Gibbons & Co., in a plea of trespass on the case to the damage of the plaintiffs seven thousand dollars, and have you then there this writ.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, the fourth Monday of November, 1858, and eighty-second year of the Independence of the United States.

NATHAN GAMMON,
Clerk.

Indorsements on same as follows:
Came to hand, April 13, 1859.

WM. M. LOWRY,
U. S. Marshal.
By S. McCAMMON,
Deputy.

Executed as to James K. Simpson, James Sevier, William Simpson, Robert Simpson, and William K. Reynolds, all on the 14th day of April, 1859.

W. M. LOWRY,
U. S. Marshal.
S. McCAMMON,
Deputy Marshal.

John A. Simpson and James M. Duff not found, and I am directed by the attorney not to look further after them.

S. McCAMMON,
Deputy Marshal.

Order for Alias Summons.

May Term, 1859. (May 19.)

Dall, Gibbons & Co.
vs.
Simpson, Brothers, Duff & Co.

It appearing to the Court, that the defendants, Duff & Simpson, have not been served with process, and on motion of plaintiffs' attorney, it is ordered by the Court that an Alias Summons issue as to said Duff and Simpson, returnable to first Monday of July at rule day.

Alias Summons: Returnable to first Monday of July at Rules.

The President of the United States:

To the Marshal of East Tennessee District, Greeting: You are hereby commanded to summons James K. Simpson, James Sevier, William Simpson, John A. Simpson, Robert Simpson, James M. Duff and William K. Reynolds, partners in trade under the firm name and style of Simpson, Brothers, Duff & Co., to appear before the Honorable the Judges of the Court of the United States for the Eighth Circuit, in the District of East Tennessee, at the court house in Knoxville, on the fourth Monday of November next, to answer Austin Dall, Joseph E. Dall and Daniel P. Gibbons, partners in trade under the firm name and style of Dall, Gibbons & Co., in a plea of trespass on the case to the damage of the plaintiffs, seven thousand dollars, and have you then there this writ.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, the third Monday of May, 1859, and eighty-third year of the Independence of the United States.

NATHAN GAMMON, *Clerk.*

(To be executed only on Duff, and the Simpson not before summoned.)

Endorsed as follows:

Executed as to James M. Duff, Sept. 20, 1859, and acknowledged by John A. Simpson.

Declaration.

United States of America, } Circuit Court,
District of East Tennessee. } May Term, 1859.

Austin Dall, Joseph E. Dall and Daniel P. Gibbons, citizens of the State of Maryland, and partners under the firm name and style of Dall, Gibbons & Co., by their attorney, complain of James K. Simpson, Robert Simpson, James Sevier, William Simpson, James M. Duff and William K. Reynolds, citizens of the State of Tennessee and residents within the said District of East Tennessee, and partners under the firm name and style of Simpson, Brothers, Duff & Co., who are in Court by summons of a plea in trespass on the case.

First Count.

For that, whereas heretofore, to wit, on the 16th day of June, 1858, at Baltimore, in the State of Maryland, to wit, in the said District of East Tennessee, one T. C. Dunham and one Robert Kearfoot, then partners, under the firm name and style of Dunham & Kearfoot, were indebted to the said Dall, Gibbons & Co., in the sum of six thousand four hundred and nineteen dollars and twenty-two cents, which said indebtedness was evidenced as follows, that is to say by one promissory note, signed by the said Dunham & Kearfoot and made payable to their own order and endorsed by them to the said Ball, Gibbons & Co., for the sum of sixteen hundred and forty-three dollars and sixty cents, and due and payable on the thirteenth day of March in the year last aforesaid; one other promissory note, drawn and endorsed in like manner, and payable on the twenty-fifth of the month and year last aforesaid, for the sum of seventeen hundred and ten dollars and twenty-two cents; one other promissory note, drawn and endorsed in like manner, for the sum of two thousand one hundred and ninety-four dollars and fifty cents, and payable on the twenty fifth day of May in the year last aforesaid; one other promissory note, drawn and endorsed in like manner, for the sum of eight hundred and forty dollars and ninety cents, due and payable on the second day of June in the year last aforesaid, and one account for the sum of thirty dollars due on the fifteenth of the month and year last aforesaid. And for that, whereas, on the day and year aforesaid and in the District of East Tennessee aforesaid, the said Simpson, Brothers, Duff & Co. were indebted to the said Dunham & Kearfoot in a large sum of money, to wit, the sum of seven thousand dollars; and for that, whereas, on the said sixteenth day of June in the year of our Lord, 1858, aforesaid, the said Dunham & Kearfoot, being in failing circumstances, the said Dall, Gibbons & Co., at Baltimore, to wit, in the said

District of East Tennessee, wrote and sent and caused to be written and sent by mail two letters, addressed to one Theo. Allen Jones, Esq., attorney at law at Rogersville, in the said District of East Tennessee, in which said letters (among other things) was enclosed to the said Theo. Allen Jones a statement of said notes and account; and by which said letters the said Theo. Allen Jones, Esq., was directed to attack by bill in equity the debt due from the said Simpson, Brothers, Duff & Co. to the said Dunham & Kearfoot, they, the said Dunham & Kearfoot, then and there being non-residents of the State of Tennessee. And for that, whereas, afterwards, to wit, on the day and year aforesaid, and in the District of East Tennessee aforesaid, the said two letters reached the post office in the said town of Rogersville, whereupon the said James M. Duff, a member of the firm of said firm of Simpson, Brothers, Duff Co., took the same from said post office and, without any authority for so doing, opened and read the same; and the said plaintiffs aver, that after the said James M. Duff had illegally, wrongfully and fraudulently acquired a knowledge of the contents of said two letters afterwards, to wit, on the day and year aforesaid, and in the said District of East Tennessee, he communicated the same to the other said members of said firm. And the said plaintiffs further aver, that after the said Simpson, Brothers, Duff & Co. had, in the manner hereinbefore described, obtained the information of their, the said plaintiffs, intention to attack the said debt due from them, the said Simpson, Brothers, Duff & Co. wrongfully, illegally and fraudulently detained the letters aforesaid in their possession, and wrongfully, illegally and fraudulently failed to forward or to deliver the same to the said Theo. Allen Jones, to whom they were directed as aforesaid, for a long space of time, to wit, for the space of eight days, with the purpose, design and intention of preventing the said plaintiffs from obtaining payment of the said notes and account, due to them by the said Dunham & Kearfoot as aforesaid, and for the further purpose of favoring the said Dunham & Kearfoot.

And the said plaintiffs further aver, that during the said time that the said letters were so wrongfully and illegally and fraudulently detained by the said Simpson, Brothers, Duff & Co., with the illegal and wrongful design aforesaid, and for the purpose aforesaid, they, the said Simpson, Brothers, Duff & Co., fraudulently, illegally, and wrongfully paid, of their said indebtedness, a large sum, to the said Dunham & Kearfoot, to wit, the sum of five thousand and five hundred dollars, and during the time aforesaid, executed their negotiable promissory note for the balance of their said indebtedness to the said Dunham & Kearfoot, to wit, for the sum of fifteen hundred dollars, and wrongfully, illegally, and fraudulently sent the same to the said

Dunham & Kearfoot, who, afterwards, to wit, on the day and year aforesaid, and in the District of East Tennessee negotiated the same.

By means of which said tortious act and the commission of which said several grievances, by the said defendants, and by the reason of the insolvency and bankruptcy of the said Dunham & Kearfoot, which occurred within a short time thereafter—have lost the whole amount of the said notes and account.

Second count.—And for that, whereas, afterwards, to wit, on the sixteenth day of June, in the year 1858, aforesaid, at Baltimore, in the State of Maryland, to wit, in the District of East Tennessee, one T. C. Dunham and Robert Kearfoot, partners under the firm name of Dunham & Kearfoot, were indebted to the said Dall, Gibbons & Co. in the sum of three thousand and sixty-five dollars and forty-cents, which said indebtedness was evidenced in the manner following, that is to say—by one promissory note for the sum of two thousand one hundred and ninety-four dollars and fifty cents, signed by the said Dunham & Kearfoot, and payable to their own order, and by them indorsed to the said Dall, Gibbons & Co., and payable on the twenty-fifth day of May, 1858; one other note, drawn and indorsed in like manner, for the sum of eight hundred and forty dollars and ninety cents, and payable on the second day of June, in the year last aforesaid; and by an account for thirty dollars, due and payable on the fifteenth day of the month, and year last aforesaid; and for that, whereas, heretofore, to wit, on the sixteenth day of June, in the year last aforesaid, in the District of East Tennessee, aforesaid, the said Simpson, Brothers, Duff & Co., were indebted to the said Dunham & Kearfoot, in a large sum of money, to wit, in the sum of seven thousand dollars. And for that, whereas, heretofore, to wit, on the said sixteenth day of June, in the year last aforesaid, at Baltimore, to wit, in the said District of East Tennessee, the said Dunham & Kearfoot being in failing circumstances, the said Dall, Gibbons & Co. wrote and sent, and caused to be written and sent by mail, two letters addressed to one, The. Allen Jones, Esq'r, attorney at law, at Rogersville, in the said District of East Tennessee, in which said letter, (among other things,) was enclosed to the said The. Allen Jones, a statement of said notes and account, and by which said letters the said The. Allen Jones, Esq'r, was directed to attach by bill in equity the said debt due from the said Simpson, Brothers, Duff & Co., to the said Dunham & Kearfoot; the said Dunham & Kearfoot being non-residents of the said State of Tennessee; and for that, whereas, heretofore, to wit, on the day and year aforesaid, and in the District of East Tennessee, aforesaid, the said two letters reached the post-office in the said town of Rogersville, whereupon the said James M. Duff, a member of the firm of the

said firm of Simpson, Brothers, Duff & Co., took the same from the said post-office, and without any authority for so doing, opened and read the same. And the said plaintiffs aver, that after the said James M. Duff had so illegally and fraudulently acquired a knowledge of the contents of said letters, he, afterwards, to wit, on the day and year aforesaid, and in the District of East Tennessee aforesaid, communicated the same to the other said members of said firm. And the said plaintiffs further aver, that after the said Simpson, Brothers, Duff & Co., had in the manner hereinbefore described, obtained the information of their the said plaintiff's intention to attach the said debt due from them, the said Simpson, Brothers, Duff & Co., to the said Dunham & Kearfoot, they the said Simpson, Brothers, Duff & Co., wrongfully, illegally and fraudulently detained the said letters in their possession, and wrongfully, illegally, and fraudulently failed to forward or to deliver the same to the said The. Allen Jones, to whom they were directed as aforesaid, for a long space of time, to wit, for the space of eight days, with the purpose and design of preventing the said plaintiffs from obtaining payment of the said notes and account, if due to them by the said Dunham & Kearfoot, as aforesaid, and of favoring the said Dunham & Kearfoot. And the said plaintiffs further aver, that during the time that the said letters were so illegally, wrongfully and fraudulently detained by the said Simpson, Brothers, Duff & Co., with the purpose and design aforesaid, they the said Simpson, Brothers, Duff & Co., in consummation of said purpose and design, paid of their said indebtedness to the said Dunham & Kearfoot, to them, a large sum of money, to wit, the sum of five thousand five hundred dollars, and executed their promissory note for the balance, to wit, the sum of fifteen hundred dollars, and wrongfully, illegally and fraudulently sent the same to the said Dunham & Kearfoot, who, afterwards, to wit, on the day and year aforesaid, and in the District of East Tennessee aforesaid, sold and transferred said promissory note. By means whereof, and by reason of the subsequent failure and insolvency, within a short time thereafter, of the said Dunham & Kearfoot, the said plaintiffs have lost the whole of said notes and account.

Third count.—And for that whereas, to wit, on the sixteenth day of June, in the year 1858 aforesaid, and in the said District of East Tennessee, one T. C. Dunhan and Robert Kearfoot, then partners, under the firm, name and style of Dunham & Kearfoot, were indebted to the said Dall, Gibbons & Co., in the sum of six thousand four hundred and nineteen dollars and twenty-two cents. And for that, whereas heretofore, to wit, on the day and year aforesaid, and in the District of East Tennessee aforesaid, the said Simpson, Brothers, Duff & Co., were indebted to the said Dunham & Kearfoot in a large sum of money, to wit, the sum of

seven thousand dollars. And for that whereas, heretofore, to wit, on the said sixteenth day of March, in the year aforesaid, at Baltimore, (to wit, in the said District of East Tennessee,) the said Dunham & Kearfoot, being in failing circumstances, the said Dall, Gibbons & Co., wrote and sent, and caused to be written and sent, by mail, two letters, addressed to one The. Allen Jones, Esq., attorney-at-law, at Rogersville, in the said District of East Tennessee, in which said letters (among other things) was enclosed to the said The. Allen Jones, a statement of said indebtedness of the said Dunham & Kearfoot, and by which said letters the said The. Allen Jones, Esq., was directed to attach the said debt due from the said Simpson, Brothers, Duff & Co., to the said Dunham & Kearfoot, they the said Dunham & Kearfoot then and there being non-residents of the State of Tennessee. And for that, whereas heretofore, to wit, on the day and year aforesaid, and in the District of East Tennessee aforesaid, the said two letters reached the Post-office in the said town of Rogersville, whereupon the said James M. Duff, a member of the said firm of Simpson, Brothers, Duff & Co., took the same from the said Post-office, and, without any authority for so doing, opened and read the same. And the said plaintiffs aver, that after the said James M. Duff had so illegally and fradulently acquired a knowledge of the contents of said letters, he afterwards, to wit, on the day and year aforesaid, and in the District of East Tennessee aforesaid, communicated the same to the other said members of said firm. And the said plaintiffs further aver, that after the said Simpson, Brothers, Duff & Co., had, in the manner hereinbefore described, obtained the information of their, the said plaintiffs', intention to attach the said debt due from them, the said Simpson, Brothers, Duff & Co., to the said Dunham & Kearfoot, they the said Simpson, Brothers, Duff & Co., wrongfully, illegally and fraudulently detained the said letters in their possession, and wrongfully, illegally and fraudulently to forward or deliver the same to the said The. Allen Jones, to whom they were directed as aforesaid, for a long space of time, to wit, for the space of eight days, with the purpose and design of preventing the said plaintiffs from obtaining payment of the said indebtedness of the said Dunham & Kearfoot to the said plaintiffs, and of favoring the said Dunham & Kearfoot. And the said plaintiffs further aver, that during the time that the said letters were so illegally, wrongfully and fraudulently detained by the said Simpson, Brothers, Duff & Co., with the purpose and design aforesaid, they the said Simpson, Brothers, Duff & Co., in consummation of said purpose and design, paid off their said indebtedness to the said Dunham & Kearfoot, to them a large sum of money, to wit, the sum of fifty-five hundred dollars, and executed their promissory note for the balance, to wit, the sum of fifteen hundred dollars, and wrongfully, illegally and fraudu-

lently sent the same to the said Dunham & Kearfoot, who afterwards, to wit, on the day and year aforesaid, and in the District of East Tennessee aforesaid, sold and transferred the said promissory note. By means whereof, and by reason of the subsequent failure and insolvency of the said Dunham & Kearfoot, which occurred within a short time thereafter, the said plaintiffs have lost the whole of their said debt.

Fourth count.—And for that, whereas, afterwards, to wit, on the sixteenth day of June, in the year 1858, aforesaid, and in the said District of East Tennessee, one T. C. Dunham and Robert Kearfoot, then partners under the firm name and style of Dunham & Kearfoot, were indebted to the said Dall, Gibbons & Co. in the sum of three thousand and fifty-five dollars and forty cents; and for that whereas, heretofore, to wit, on the day and year aforesaid, and in the District of East Tennessee, aforesaid, the said Simpson, Brothers, Duff & Co., were indebted to the said Dunham & Kearfoot in a large sum of money, to wit, the sum of seven thousand dollars. And for that, whereas, heretofore, to wit, on the said sixteenth day of March, in the year aforesaid, at Baltimore, (to wit, in the said District of East Tennessee, the said Dunham & Kearfoot being in failing circumstances, the said Dall, Gibbons & Co. wrote and sent by mail two letters addressed to The. Allen Jones, Esq'r, attorney at law, at Rogersville, in the said District of East Tennessee, in which said letters, (among other things,) was enclosed to the said The. Allen Jones, a statement of the said indebtedness of the said Dunham & Kearfoot, and by which letters the said The. Allen Jones, Esq'r, was directed to attach the said debt due from the said Simpson, Brothers, Duff & Co., to the said Dunham & Kearfoot, they the said Dunham & Kearfoot then being non-residents of the said State of Tennessee; and for that, whereas, heretofore, to wit, on the day and year aforesaid, and in the District of East Tennessee, aforesaid, the said two letters reached the post-office in the said town of Rogersville, whereupon the said James M. Duff, a member of the said firm of Simpson, Brothers, Duff & Co., took the same from the said post-office and without any authority for so doing, opened and read the same. And the said plaintiffs aver, that after the said James M. Duff had so illegally and fraudulently acquired a knowledge of the contents of said letters, he, afterwards, to wit, on the day and year aforesaid, and in the District of East Tennessee, aforesaid, communicated the same to the other said members of said firm. And the said plaintiffs further aver, that after the said Simpson, Brothers, Duff & Co. had in the manner herein before described, obtained the information of their, the said plaintiff's, intention to attach the said debt due from them, the said Simpson, Brothers, Duff & Co., to the said Dunham & Kearfoot, they, the said Simpson, Brothers, Duff

& Co. wrongfully, illegally and fraudulently detained the said letters in their possession, and wrongfully, illegally and fraudulently failed to deliver or forward the same to the said The. Allen Jones, to whom they had been directed as aforesaid, for a long space of time, to wit, for the space of eight days, with the purpose and design of preventing the said plaintiffs from obtaining payment of the said indebtedness of the said Dunham & Kearfoot to the said plaintiffs, and of favoring the said Dunham & Kearfoot. And the said plaintiffs further aver, that during the time that the said letters were so wrongfully, illegally and fraudulently detained by the said Simpson, Brothers, Duff & Co., with the purpose and design aforesaid, they the said Simpson, Brothers, Duff & Co., in consummation of said purpose and design, paid of their said indebtedness to the said Dunham & Kearfoot, to them a large sum of money, to wit, the sum of fifty-five hundred dollars, and executed their promissory note for the balance of their said indebtedness, to wit, the sum of fifteen hundred dollars, and wrongfully, illegally and fraudulently sent the same to the said Dunham & Kearfoot, who afterwards, to wit, on the day and year aforesaid, and in the said District of East Tennessee, sold and transferred the said promissory note.

Conclusion.—By means whereof, and by reason of the subsequent failure and insolvency of the said Dunham & Kearfoot—which occurred within a short time thereafter—the said plaintiffs have lost the whole of their said debt—and hath been made to incur great costs and expenses, in and by paying agents, attorneys and counsellors, for their services in attempting to save and recover the said several sums of money,—to the damage of the plaintiffs, seven thousand dollars. Therefore they sue.

SNEED & COCKE, *Attorneys.*

Pleas.

And the said defendants, by their attorneys say, that they are not guilty of the premises above laid to their charge, or any part thereof, in manner and form as the said plaintiffs have complained, and of this the said defendants put themselves upon the country.

CROZIER & REECE, and
BAXTER & FLEMING,
Attorneys for Defendants.

And the plaintiffs also.

SNEED & COCKE,
Attorneys for Plaintiffs.

Trial.

May Term, 1860. May 23d, 1860.

Dall, Gibbons & Co.
vs.
Simpson Brothers, Duff & Co.

This day came the parties, by their attorneys, and thereupon came a jury of good and lawful men, to wit, John Ramsey, Parland Hill, Andrew Bogle, Hugh Garner, W. R. Fitzimmons, N. W. Easterly, Craven Sherrill, William Ross, John A. Aiken, Joseph Galbraith, John E. Helms, and James Montgomery, who, being duly elected, tried and sworn, to try the issues joined in this cause, when, during the progress of this cause came an order for adjournment, and the said jury ordered by the Court to appear and resume the consideration of the cause to-morrow morning at nine o'clock.

May 24, 1860.

Dall, Gibbons & Co.
vs.
Simpson Brothers, Duff & Co.

Came the parties, by their attorneys, and thereupon again came the same jury engaged in the consideration of this cause on yesterday, to wit, John Ramsey, Parland Hill, Andrew Bogle, Hugh Garner, W. R. Fitzimmons, N. W. Easterly, Craven Sherrill, William Ross, John A. Aiken, Joseph Galbraith, John E. Helms and James Montgomery, who, having been, as before stated, duly elected, tried and sworn, to try the issues joined in this cause, when, during the progress of the cause, came an order for adjournment, and the said jury were ordered by the Court to appear in Court to-morrow morning, at nine o'clock, to resume the consideration of this cause.

May 25, 1860.

Austin Dall, Daniel P. Gibbons, and Joseph B. Dall
vs.
James K. Simpson, Robert Simpson, William Simpson, James M. Duff, James Sevier, and Wm. K. Reynolds, under the firm name and style of Simpson Bros., Duff & Co.

Come the parties, by their attorneys, and thereupon again came the following jury of good and lawful men of the Eastern District

of Tennessee, to try the issues joined in this cause; to wit, John Ramsey, Parland Hill, Andrew Bogle, Hugh Garner, W. R. Fitzimmons, N. W. Easterley, Craven Sherrill, William Ross, John A. Aiken, Joseph Galbraith, John E. Helms, and James Montgomery, who, upon their oaths, do say, that they find the issues in favor of the plaintiffs, and thereupon assess the plaintiffs' damages at the sum of thirty-four hundred dollars and ninety-one cents, their damages sustained by reason of the wrongs and injuries in the declaration mentioned, as assessed by the jury aforesaid. And also all the costs of this cause, for which execution may issue.

Whereupon, the defendants, by attorney, come and move the Court for a new trial in this cause.

May 26, 1860.

Dall, Gibbons & Co.
vs.
Simpson Brothers, Duff & Co. } Case.

The parties, by their attorneys, appear, and on consideration of the motion heretofore made by the attorney for defendants for a new trial in this cause, after argument of counsel, it is ordered by the Court that said motion be overruled, and that the finding of the jury be considered the judgment of the Court.

May 26, 1860.

Austin Dall, Daniel P. Gibbons, and Joseph B. Dall,
vs.
James K. Simpson, Robert Simpson, Wm. Simpson, James M. Duff, James Sevier, and Wm K. Reynolds. } Case.

A rule for a new trial having been obtained, and after argument overruled, the defendants, by counsel, present their Bill of Exceptions, which is signed and sealed by his Honor, the presiding Judge, and now a part of the record in this cause. Whereupon, defendants executed bond in conformity with the Act of Congress in that case made and provided, as preliminary to the obtaining a writ of error to remove the record in this cause for revision, to the Supreme Court of the United States, with James T. Shields as security in the penal sum of five thousand dollars, and the same being adjudged sufficient, is accepted by the Court; and on motion of defendants' attorney, a writ of error is allowed and awarded them. And it appearing to the Court that a citation as required by Act of Congress has been duly served on the attorney of defendants in error, and a copy of

said writ of error and citation has been filed in the office of the Clerk of this Court, by the plaintiffs in error for the defendants in error. It is ordered that said writ of error shall operate as a supersedeas of execution in this cause.

Bond.

Circuit Court of the United States for the District of East Tennessee.

Dall, Gibbons & Co.
vs.
Simpson Brothers, Duff & Co. } In Error.

Know all men by these presents, that we, James K. Simpson and James T. Shields, are held and firmly bound unto Austin Dall, Joseph E. Dall, and Daniel P. Gibbons, sueing in this cause by their firm name and style of Dall, Gibbons & Co., in the sum of five thousand dollars, to be paid to the said Austin Dall, Joseph E. Dall, and Daniel P. Gibbons, their executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals, dated on this the 26th day of May, A. D. 1860.

Whereas, the above bounden James K. Simpson, with Robert Simpson, James Sevier, William Simpson, James M. Duff and William K. Reynolds, who have been sued in the Circuit Court of the United States, holden at Knoxville, in the District of East Tennessee, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in said suit of Austin Dall, Joseph E. Dall, and Daniel P. Gibbon, against them, by the said Circuit Court of the United States, holden at Knoxville, in the said District of East Tennessee, on the 3d Monday in May, 1860. Now, therefore, the condition of this obligation is such, that if the above-named James K. Simpson, Robert Simpson, James Sevier, William Simpson, James M. Duff and William K. Reynolds, shall prosecute their said writ of error to effect, and shall answer all damages and cost, if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JAMES K. SIMPSON, [SEAL.]
JAMES T. SHIELDS. [SEAL.]

Sealed and delivered in open
Court, in the presence of

Bill of Exceptions.

Dall, Gibbons & Co.	Circuit Court of United States,
vs.	8th Judicial District.
Simpson, Brothers, Duff & Co.	May Term, 1860.

Be it remembered, that upon the trial of this cause the plaintiffs introduced S. M. C. Bartelow, who testified, that in the year 1858 he was the assistant book-keeper in the mercantile establishment of Dunham & Kearfoot, and that he had been acquainted with them since the year 1853; that the firm of Dunham & Kearfoot were doing business during the year 1858, and previous thereto in the city of Baltimore, Maryland; that Thornton C. Dunham and Robert W. Kearfoot composed said firm; that said firm of Dunham & Kearfoot suspended payment some time during the month of March, 1858; that said firm at the time of its suspension had on hand a large quantity of goods and other merchandise, and had large amounts of money due to it in various parts of the country. That the creditors of said firm, by tacit consent, permitted it to go on and wind up its affairs, and pay over its assets to its creditors; and that said firm of Dunham & Kearfoot continued in the possession of its assets, winding up the business of said firm until the latter part of the month of June, 1858, when they failed. The note marked (Exhibit No. 1), due eight months after date of September 30th, 1857, calling for $840 90, and signed and endorsed Dunham & Kearfoot, was proved by witness to be in the handwriting of said Dunham, one of said firm, and that the endorsement in blank of Dunham & Kearfoot is also in the handwriting of the said . Witness further proved, that the note, marked Exhibit No. 2, calling for $2194 50, and due eight months after the date 22d September, 1857, and signed and endorsed in blank Dunham & Kearfoot, is in the handwriting of said Kearfoot, one of said firm.

The counsel of the plaintiffs then asked leave of the Court to fill up the blank endorsements on the said two notes, so as to make them payable to Dall, Gibbons & Co., which leave was granted by the Court, and the two said notes, with the endorsements as filled up, were then read by the plaintiffs to the jury. To which action of the Court the defendants excepted.

The plaintiff then introduced Theodore Allen Jones, who testified, that he is a practising attorney at law; that he obtained his license as an attorney in 1856; that before studying law he was a clerk in the establishment of the defendants, in the town of Rogersville, Tennessee; that one of the defendants, viz.: James K. Simpson, married the first cousin of witness; that the firm of Simpson, Brothers, Duff & Co. consisted of James K. Simpson, Robert Simpson, James Sevier, William Simpson, James M. Duff and William K. Reynolds; that James K. Simpson, William

Simpson, James Sevier and James M. Duff resided in the town of Rogersville, Hawkins county; that John A. Simpson resides at Flat Gap, Hancock county; Robert Simpson resides at Mooresburgh, fourteen miles from Rogersville, and William K. Reynolds at St. Clair, eight miles from Rogersville. Witness and the defendant, James M. Duff, have always for years been upon the most intimate terms of friendship. While witness was at the law school studying law, witness carried on a correspondence with a young lady, through defendant, James M. Duff. Witness sen this, witness', letters, addressed to said Duff, and authorized said Duff to read witness' letters before handing them over to the young lady with whom witness was corresponding; said Duff had for years been authorized to take witness' letters out of the post office at Rogersville, and in witness' absence to forward the same to him. Witness never authorized said Duff, however, to open his business letters during witness' absence.

During the month of March, 1858, and previous to that, for some time, witness was absent from Rogersville, where he had formerly lived, and was then in Florence, Alabama. Upon the 1st day of April, 1858, witness had received two letters, written to witness by William E. Cocke, addressed to witness at Rogersville, and forwarded to witness, from Rogersville to Florence, where witness then was. On witness being asked to produce said two letters, he stated that when he left Florence, a few days before this trial,—for the purpose of attending as a witness,—that witness looked over his papers for all such documents as related to this case: said letters were not among his papers. Witness recollects thinking about the two said letters during the time he was looking over his papers, but being under the impression that when the declaration was filed in this case that he had left the said two letters with James R. Cocke, one of the plaintiffs' attorneys, who resides in Knoxville, Tennessee, witness did not make any special search for the said two letters, written to him by Wm. E. Cocke, Jr., more than for the other documents.

James R. Cocke, being then introduced by plaintiff, testified, that he had had the said two letters written by Wm. E. Cocke, Jr., to the witness, Jones, in his possession, while he was drawing the declaration in this case, but was under impression he had returned the said two letters to witness, Jones. Witness had not examined his files of letters before the commencement of this term of the Court, in getting his papers together for the trial, and had not found said letters, and not finding them among the other papers in his possession, he had supposed the witness, Jones, had them.

Upon this testimony, the plaintiffs asked the Court to let them give secondary evidence of the contents of said letters, without the production of the said letters, and the Court permitted the witness, Jones, to go on and testify as to his recollection of the

contents of said letters, to which action of the Court, in allowing secondary evidence, while the existence of better shown, the defendants except. The witness, Jones, ... to testify that one of said letters was dated Baltimore, ... March, 1858, and the other Baltimore, 17th March, 1858: that one of said letters contained two notes, drawn by the firm of Dunham & Kearfoot, dates and amounts not recollected; one of the said notes of the said Dunham & Kearfoot was due at the time it was sent to witness: the other note was not due, but would shortly fall due. In one of the letters which Wm. E. Cocke, Jr., wrote to witness, there was a statement of the amount due from Dunham & Kearfoot, to the plaintiffs, Dall, Gibbons & Co. But the amounts and particulars of that statement witness is unable to remember. In one of the letters, which the said Wm. E. Cocke, Jr., wrote to witness, witness was instructed by said Wm. E. Cocke, Jr., as the agent of Dall, Gibbons & Co., to ascertain from Messrs. Simpson, Brothers, Duff & Co., what they, the said defendants, owed to the firm of Dunham & Kearfoot. The said Wm. E. Cocke, Jr., in the letter said that the plaintiffs wished witness to attach whatever the defendants might owe said Dunham & Kearfoot, to secure to plaintiffs the payment of the claims then sent out to witness. The said Wm. E. Cocke, Jr., further stated in said letter, that said claims had been sent to witness because his intimacy and relationship with the defendants would enable him to ascertain from defendants the amount of their indebtedness to said Dunham & Kearfoot.

As soon as witness received the two said letters at Florence, Ala., on the first day of April, 1858, witness started to Rogersville, to attend to the business. Witness left Florence, 2d April, 1858; witness received both of said letters at Florence, under the cover of one envelope, and by the same mail witness received a long friendly letter from James M. Duff, dated Rogersville, 27th March, 1858, and post marked March 29th, 1858; Duff in this letter of his to witness, said nothing about having opened the two letters written by Wm. E. Cocke to witness, and which had been forwarded. Witness did not notice at the time he received them, that said two letters appeared to have been opened. They had been resealed. Witness has since then noticed quite evident appearances that said two letters had been opened, and doubtless could have seen it at the time of receiving them, had his attention then been called to the subject. Duff, in the letter he wrote to witness, spoke of writing on Sunday. As soon as witness got to Rogersville, he went to James K. Simpson, the senior member of the firm of Simpson, Brothers, Duff & Co., and who married a cousin of witness. Witness showed the two letters witness had received from Wm. E. Cocke, with the instructions of Dall, Gibbons & Co., and asked the counsel of said Simpson in the premises. Witness was told by said Simpson, that the claims of

Simpson, James Sevier and James M. Duff resided in the town of Rogersville, Hawkins county; that John A. Simpson resides at Flat Gap, Hancock county; Robert Simpson resides at Mooresburgh, fourteen miles from Rogersville, and William K. Reynolds at St. Clair, eight miles from Rogersville. Witness and the defendant, James M. Duff, have always for years been upon the most intimate terms of friendship. While witness was at the law school studying law, witness carried on a correspondence with a young lady, through defendant, James M. Duff. Witness sen this, witness', letters, addressed to said Duff, and authorized said Duff to read witness' letters before handing them over to the young lady with whom witness was corresponding; said Duff had for years been authorized to take witness' letters out of the post office at Rogersville, and in witness' absence to forward the same to him. Witness never authorized said Duff, however, to open his business letters during witness' absence.

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contents of said letters, to which action of the Court, in allowing secondary evidence, while the existence of better evidence was shown, the defendants except. The witness, Jones, then went on to testify that one of said letters was dated Baltimore, 16th March, 1858, and the other Baltimore, 17th March, 1858: that one of said letters contained two notes, drawn by the firm of Dunham & Kearfoot, dates and amounts not recollected; one of the said notes of the said Dunham & Kearfoot was due at the time it was sent to witness: the other note was not due, but would shortly fall due. In one of the letters which Wm. E. Cocke, Jr., wrote to witness, there was a statement of the amount due from Dunham & Kearfoot, to the plaintiffs, Dall, Gibbons & Co. But the amounts and particulars of that statement witness is unable to remember. In one of the letters, which the said Wm. E. Cocke, Jr., wrote to witness, witness was instructed by said Wm. E. Cocke, Jr., as the agent of Dall, Gibbons & Co., to ascertain from Messrs. Simpson, Brothers, Duff & Co., what they, the said defendants, owed to the firm of Dunham & Kearfoot. The said Wm. E. Cocke, Jr., in the letter said that the plaintiffs wished witness to attach whatever the defendants might owe said Dunham & Kearfoot, to secure to plaintiffs the payment of the claims then sent out to witness. The said Wm. E. Cocke, Jr., further stated in said letter, that said claims had been sent to witness because his intimacy and relationship with the defendants would enable him to ascertain from defendants the amount of their indebtedness to said Dunham & Kearfoot.

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Dall, Gibbons & Co., against Dunham & Kearfoot, had been turned over to another attorney of law, viz., John A. McKinney, and that the said McKinney was then at Knoxville, trying to get an attachment on the amount defendants might owe said Dunham & Kearfoot. Witness was told by Simpson, that on the 26th March, 1858, he had remitted $2,000 to Dunham & Kearfoot, and that the firm of Simpson, Brothers, Duff & Co. then owed nothing to Dunham & Kearfoot, except about the sum of $1500, for which he had sent to said Dunham & Kearfoot the note of defendants. Afterwards, when witness had ascertained that the two letters addressed to him by Dall, Gibbons & Co., Wm. E. Cocke, had been opened by defendant, Duff, and shown by him to James K. Simpson, said Simpson said to witness that he felt himself under special obligation to pay the debt due to Dunham & Kearfoot, as they had been good friends of theirs; that he the said Simpson had been repeatedly written to by said Dunham & Kearfoot, to pay up the amount due to them, that he had been trying to get exchange, had been waiting till the return of Jno. Blevins, and the payment of some other debts due to the firm of Simpson, Brothers, Duff & Co., so as to get exchange cheaper, and that he hoped the attachment McKinney was trying to get, would not catch what he had sent on to the said firm of Dunham & Kearfoot. Wm E. Cocke, Jr., who wrote to witness—a member of the firm of Geo. W. Howard & Co., of Baltimore, Maryland, is a cousin of witness, also a cousin of James K. Simpson's wife, and the two letters which the said Wm. E. Cocke, Jr., wrote to witness, had the card of the house of G. W. Howard & Co. stamped upon the envelope. Witness saw Duff while in Rogersville, where he remained several days, and saw Duff constantly, and for a part of the time slept with him at night; he said nothing to witness about having opened his letters. Upon the return of witness to Florence, witness received from the plaintiffs, Dall, Gibbons & Co., information that the two letters which had been forwarded to witness at Florence, had been opened by James M. Duff before they were forwarded to witness; witness in the latter part of June, 1858, wrote to Duff, inquiring if he had opened his letters, and if so, expressing witnesses' astonishment that he had done so. Witness received a letter from Duff in reply, which letter witness had lost. Defendants' counsel then showed witness a paper, and asked witness if that was not an exact copy of the letter which he had received from Duff. Witness said it was, and stated the copy was in the handwriting of James M. Duff. The copy of said letter of Duff was then read to jury, and is marked (Exhibit No. 3,) to this bill of exceptions. Witness is satisfied that Duff, in opening the letters, meant no harm to him, the witness. Had witness been in Rogersville when the letters arrived he would doubtless have gone directly to Simpson and told him about the letters I

had got. I think so, from my intimacy with him, and from some directions to that effect in the letters themselves.

Wm. E. Cocke, Jr., next witness for plaintiffs, then testified, that he is a member of firm of G. W. Howard & Co., of Baltimore; that Dunham & Kearfoot and Dall, Gibbons & Co., all reside in Maryland, That at the instance of Messrs. Dall, Gibbons & Co. witness had written to Theo. Allen Jones to attach debt due to Dunham & Kearfoot by Simpson, Brothers, Duff & Co., if they owed D. & K. anything—directed Jones to go to Simpson to get information in regard to indebtedness of said firm to D. & K. I think I sent two notes to Jones, but sent also statement of account between the parties—not certain. Witness afterwards, learning that Jones was absent from Rogersville, wrote to John A. McKinney, sending to said McKinney two other notes, together with a statement of the entire indebtedness of Dunham & Kearfoot to Dall, Gibbons & Co., directing said McKinney to take the letters to Jones out of the post office, and to sue out an attachment on all the claims due to Dall, Gibbons & Co. against any debt Simpson, Brothers, Duff & Co. might owe Dunham & Kearfoot. Witness sent claims to Jones on account of relationship to Simpson, and there was some remark in witness' letter, from which Jones might have felt himself authorized, if not directed, to consult Simpson in relation to the business entrusted to his care. Witness used an envelope in writing to Jones, stamped with card of Geo. W. Howard & Co. Witness is cousin of both Jones and James K. Simpson's wife. Exhibit No. 4, witness wrote to John A. McKinney from Baltimore—it is post marked "Baltimore, Md., Mar. 25th." Exhibit No. 5 was written by witness to Col. John A. McKinney from Baltimore—it is post marked "Baltimore, Md., Mar. 25th." Exhibits No. 4 and 5 were read to jury. Exhibit No. 4 contained Exhibit No. 6, which was also read to jury.

Plaintiffs then read a transcript of the case of Dall, Gibbons & Co., commenced by attachment in Chancery Court, at Rogersville, against Dunham & Kearfoot and others. This transcript is marked Exhibit No. 7, and is made part of the bill of exceptions, as are also all the other named exhibits.

The plaintiffs then introduced Col. Jno. A. McKinney, who testified, that he is an attorney at law, practising and residing at Rogersville. He had sent to him the claims of Dall, Gibbons & Co., and the statement, Exhibit No. 6, sent to him in Exhibit No. 4. In accordance with directions in Exhibit No. 4, witness called at the post-office at Rogersville — called for the letters addressed to Theo. Allen Jones—was told by Major Edmonds, the postmaster, that they had been taken out of the post-office. Witness then went to see James M. Duff—asked Duff for the Jones letters—was told by Duff that he, Duff, had forwarded the said letters to Jones several days before. Witness inquired of

Duff whether their firm was indebted to Dunham & Kearfoot, he replied he did not know and referred witness to defendant, James K. Simpson. Witness saw said Simpson at his residence that night, and upon asking him the same question received for answer that he did not know, but that he would let witness know next day. On the next day, upon being called on again by witness, he stated that their indebtedness to Dunham & Kearfoot was sixteen hundred dollars. This conversation occurred between witness and Duff on the 29th day of March, 1858. Witness then saw James K. Simpson—asked said Simpson how much his firm owed Dunham & Kearfoot—was told by said Simpson that he did not know exactly—would look at his books—to call next day—called next morning and was told that Simpson, Brothers, Duff & Co. owed Dunham & Kearfoot then about $1600 or $1700. James K. Simpson told witness that on the 26th March, 1858, he, James K. Simpson, had remitted $2000 of the indebtedness due to Dunham & Kearfoot, and that on the first day of April he had remitted to same by drafts $1500, and sent them negotiable notes for $1600 more. Witness filed the bill in Exhibit No. 7 contained. Witness knows nothing of the opening of Jones' letters by Duff, except that witness was told by Duff that he had opened them, thinking he would be doing a kindness to Jones in so doing. This was after Jones and the plaintiffs had discovered that the letters had been opened. Witness called on James K. Simpson for an explanation of his conduct in the business. He said he meant no unkindness to witness, but was anxious to put the money in Dunham & Kearfoot's hands—he had sent a messenger to Mooresburgh for $1000, which he wished to remit to them, and had sat up till a late hour of the night awaiting his return.

The defendants then introduced Major Edmunds, who testified, that he is and was, during the months of March and April, 1858, and previous thereto, the Postmaster at Rogersville, Tennessee. A letter mailed from Baltimore, Maryland, to Rogersville, if it came directly through, without any detention, might come in three days; if, however, it should drop into the distributing post-office at Abingdon, on the way, which very often happened, it would take from five to six days, unless there was an accident on the road, then it might be longer. Does not know who took the letters addressed to The. Allen Jones from Baltimore out of Post-office. Defendant Duff boarded with witness, and usually took out the mail. It was the general habit of the Postmaster at Rogersville, and had been so for years, to put The. Allen Jones' letters into the box of Simpson. Brothers, Duff & Co. James M. Duff was in the habit of forwarding Jones' letters to him during his absence. Duff and James K. Simpson, the corresponding members of the firm of Simpson, Brothers, Duff & Co., generally.

This was all the testimony submitted in the case to the jury.

The Court, among other things not excepted to, charged the jury as follows:

The Court charged the jury—1st. That if the defendants were about to remove their property beyond the limits of the State, the plaintiffs would have had the right to attach such property; that indebtedness by defendants to Dunham & Kearfoot was property within the meaning of the Statutes of Tennessee; that if the defendants, by arrangement with insolvent creditors, intended to pay portions of their debts, and convert other parts into negotiable securities, so as to defeat the power of the plaintiffs to collect their debts from such insolvent non-resident creditors, who were plaintiffs' debtors, such conduct would amount to a removal of the property from the limits of the State, and if such measures were in contemplation, the plaintiffs would have the right to attach such indebtedness, to prevent its removal and secure their debt.

2d. Did the defendants, wrongfully, fraudulently and illegally, obtain a knowledge of the contents of the letter of plaintiffs to their attorney, Jones? Authority to forward a letter is not an authority to break it open. If the defendants broke open plaintiffs' letter to attorney, instructing the issuance of process, without authority, it was a violation of the legal rights of plaintiffs. If they took the letter out and broke it open, with intent to pry into the business transactions of the plaintiffs, it would have been a criminal offence; but if they broke open the letter with good motives, but without authority, it would still have been a violation of the legal rights of the plaintiffs in this action.

The letter was intended to be conveyed by post to their attorney, and nobody had any right to the information therein contained; and the breaking open the letter, without authority, and thereby arriving at a knowledge of the contents of the letter, was wrongful and illegal.

3d. Did the defendants detain the letters thus broken open, with the view and purpose (as charged in the declaration) to enable them to use the information so illegally obtained, and pay the debts and convert it into negotiated securities, before the plaintiffs could issue their attachment and secure their debt. If they did, such detention, with such motives, was an illegal, wrongful and fraudulent violation of the rights of the plaintiffs, for which a right of action exists.

4. Have the plaintiffs been injured, and to what extent?

It must appear clearly and satisfactorily that Dunham & Kearfoot were insolvent, and that the plaintiffs lost their debts in consequence of the illegal and fraudulent conduct of the defendants in breaking open the letter and detaining it, and making use of the information obtained by the wrongful act. As the defendants have paid the debts to Dunham & Kearfoot, the proof should be clear and satisfactory.

In the event the jury find that the plaintiffs lost their debts by reason of the fraudulent conduct of the defendants as above stated, and the insolvency of Dunham & Kearfoot, they would be entitled to recover the amount of their debts, such debts being not more than the amount due from Simpson Brothers, Duff & Co.

5. All the partners who knew how the information was illegally and wrongfully obtained, and concurred in the subsequent acts to defeat the plaintiff's attachment by payment to the insolvent debtors, are liable for the damages, and none but those who did.

Upon the motion for a new trial the defendants presented to the Court the affidavit of the defendant, James K. Simpson, which is marked Exhibit No. 8, and made a part of this Bill of Exceptions. The Court overruled the motion for a new trial, to all which action of the Court the defendants except, and tender this their Bill of Exceptions, which is signed and sealed by the Court, and ordered to be made a part of the record in this case.

W. H. HUMPHREYS, [L. S.]
U. S. D. Judge.

Exhibit No. 1 *to Bill of Exceptions.*

$840 90. Baltimore, September 30, 1857.

Eight months after date we promise to pay to the order of ourselves, eight hundred and forty $\frac{90}{100}$ dollars, value received.

No. 1083, due 30–2 June, 1858.

DUNHAM & KEARFOOT.

On which is the following endorsement, to wit:

Pay to Dall, Gibbons & Co.

DUNHAM & KEARFOOT.

Exhibit No. 2.

$2194 50. Baltimore, September 22d, 1857.

Eight months after date we promise to the order of ourselves, twenty-one hundred and ninety-four $\frac{50}{100}$ dollars, value received.

No. 1023. Due 22–25 May, 1858.

DUNHAM & KEARFOOT.

(Endorsed as follows:)

Pay to Dall, Gibbons & Co.

DUNHAM & KEARFOOT.

Without recourse to Dall, Gibbons & Co.

Exhibit No. 3. (*Duff's Letter to Jones.*)

Rogersville, 8th July, 1858.

Dear The:—Yours of date ——— is to hand, and but for my absence from home at the time of its arrival, should have had an

earlier notice. I have only to say, it is true I opened the letter referred to. In so doing I was actuated by none other than pure motives, the letter was from a place I believed you had no private correspondence with, and at the time, it occurred to my mind that it might be a business letter, and one that demanded prompt and immediate attention. This was the only reason I had for the act.

Owing to the very friendly relations that had always existed between us, and feeling a lively interest in your welfare, I thought I might safely take this liberty, and in taking it I was prompted alone by the feeling of doing what I supposed would be of service to you in your absence. When I found that the letter was connected with our business, I mentioned it to Col. Simpson, your relation, and my partner, who expressed himself very sorry that it had been opened. I then resealed and forwarded it to you at once. If *I committed an error, it was in not then informing you what I had done; this, however, was an error of omission only.* Before opening the letter, I had no knowledge or intimation of its contents. I truly regret that I did so, as you say you are astonished at it. I am surprised that you should express astonishment at it, in view of our long intimacy, and in view of the fact that I have for so many years taken out your letters from the post-office at your request, and forwarded them to you, when you were absent from Rogersville, as you were when I opened the letter. If I erred in supposing that I was justified in opening a mere business letter, it was not an error of intention. I sincerely thought I was doing right, and for the promotion of your interest. No circumstance has ever occurred that has given me more pain—it distresses me to learn from the disapprobation implied in your letter, that you are not so friendly to me as I was to you, and condemn an act, which, had it been done by yourself under similar circumstances, I would not have censured. The fact that I opened the letter, did you, I trust, no harm, nor your client. I forwarded them at once, on finding as I did, most unexpectedly, that the letter contained claims sent out in behalf of Dall, Gibbons & Co., against Dunham & Kearfoot, which they desired to secure by attaching a debt due from Simpson, Bros., Duff & Co., to Dunham & Kearfoot. When I first saw the letters, I did not know how long they had been in the store—and seeing two letters with the name of G. W. Howard & Co. stamped on the envelopes, it occurred to me that they were business letters of importance, and required immediate attention; knowing that they, G. W. Howard & Co., did a considerable business in this section of the country, and not for one moment supposing that the business could have any connection with our house, as we at the time did not owe them anything. I knew also that W. E. Cocke, a member of the firm of G. W. Howard & Co., was a relation of yours, and it was natural for me

to suppose that business from them would be placed in your hands, when they needed an agent at this point; and I repeat, when I first saw the letters, it immediately occurred to my mind that they were upon business that required prompt attention, which I might be able to give them in your absence. But when I discovered that the letter related to a debt due from our firm to a different firm than G. W. Howard & Co., I forwarded them to you at once—but even then, I have reason to believe that Dall, Gibbons & Co. hearing that you had removed to Alabama, engaged the services of Col. John A. McKinney, and that he was at Knoxville, endeavoring to obtain an injunction as you came up from Alabama with the claims—I may be mistaken, but my understanding is that Col. McKinney attends alone to the business. If the statement of claims was sent to him, and the business transferred into his hands before you reached Rogersville, and when as a citizen of Florence you could not be expected to attend to the business, I am really at a loss to perceive how my intended kindness can have operated to your prejudice, as we were making arrangements, and using every effort to settle our indebtedness to Dunham & Kearfoot, before we had any intimation of Dall, Gibbons & Co.'s claims. I repeat, however, that I am sorry this thing has occurred, because it may produce an estrangement between us, who have so long been friends; but never having attempted to conceal the fact that I opened the letter, and having frankly and candidly stated the reasons which prompted me to do so, I can only express the hope that your implied censure will be withdrawn. If it is not, I will still be sustained by a consciousness that I was animated by no improper motive. Hoping that the explanation will prove satisfactory, and that our former friendship may still remain unchanged, I trust I shall hear from you soon.

Your friend, truly,

J. M. DUFF.

Exhibit No. 4. (*Wm. E. Cocke to Col. J. A. McKinney*)

BALTIMORE, March 25, 1858.

Col. J. A. McKinney:

DEAR SIR,—A few days since I directed a letter to Mr. Theo. Allen Jones, expecting it to reach him in Rogersville; I have since understood that he has left the place. You will please go to the Post-office, and get the letter, open it, and attend to its contents. It is on very important business. For fear it may have been forwarded, I will ask you to get out an attachment against all the claims due from Simpson Brothers, Duff & Co., to Messrs. Dunham & Kearfoot, in the name of Dall, Gibbons & Co., of this place. D. & K. do business also in this city.

I enclose you statement of D., G. & Co. account *vs.* D. & K.,

There may be some drafts in one of the Banks accepted by S. B. D. & Co., which you can attach. Write to Messrs. Dall, Gibbons & Co. what the prospect is.

Your friend,
WM. E. COCKE, JR.

Exhibit No. 5.

BALTIMORE, March 25, 1858.

Col. J. A. McKinney:

DEAR SIR,—In my letter of yesterday, I neglected to say to you, that you had better find out whether there is any claim in your town that an attachment would hold, before instituting proceedings. It is hardly worth while to write this, as you are much better posted in such cases than I.

Your friend,
WM. E. COCKE, JR.

Exhibit No. 6.

BALTIMORE, March 16, 1858.

Messrs. Dunham & Kearfoot:

To Dall, Gibbons & Co.

(Notes payable to your own order, in monthly settlements.)

To note due March 13,	. . .	$1,643.60	
" " " 25,	. . .	1,710.22	
" " " May 25,	. . .	2,194.50	
" " " June 2,	. . .	840.90	
" Merch'dse " 15,	. . .	30.00	
			$6,419.22

Exhibit No. 7, (*Transcript.*)

CLERK AND MASTER'S OFFICE,
Rogersville, May 18, 1860.

Dall Gibbons & Co.
vs.
Dunham & Kearfoot, et al.

A Copy of the Proceedings had in the Chancery Court, at Rogersville, in the above cause.

(*Copy of Bill.*)

To the Honorable Seth J. W. Luckey, Chancellor for the Eastern Division of Tennessee, sitting in Chancery at Rogersville. Complainants: Austin Dall, Daniel P. Gibbons and Joseph E. Dall, merchants and citizens of Baltimore, Maryland, partners in trade, under the name and style of Dall, Gibbons & Co., would respectfully show unto your Honor that Dunham & Kearfoot, merchants and citizens of Baltimore, Maryland, partners in trade, under the name and style of Dunham & Kearfoot, are indebted

to complainants in the sum of six thousand four hundred and nineteen dollars and twenty-two cents, which indebtedness is evidenced by four several notes, of the respective amounts of sixteen hundred and forty-three dollars and sixty cents, seventeen hundred and ten dollars and twenty-two cents, twenty-one hundred and ninety-four dollars and fifty cents, and eight hundred and forty dollars and ninety cents, with an open account of thirty dollars, all of which will be produced at the hearing of this case. Complainants would further state that they are in danger of being defrauded out of the entire sum mentioned above, unless something can be found within your Honor's jurisdiction, which can be attached. They are informed, and believe, that the mercantile firm of Simpson Brothers, Duff & Co., of Rogersville, Tennessee, of which James K. Simpson, William Simpson, James M. Duff, James Sevier, and others to the complainants not known, are partners, and all of whom reside in Hawkins county, Tennessee, and mercantile firm of John A. & R. Simpson & Co., of Mooresburg, Tennessee, of which John A. Simpson, of Hancock county, Tennessee, and Robert Simpson, of Hawkins county, Tennessee, and others to the complainants not known, are partners (said mercantile firms being connected in business), are indebted to the said firm of Dunham & Kearfoot, in about the sum of seventeen hundred dollars, for goods purchased, and complainants so charge.

The premises considered, complainants pray that the said Dunham & Kearfoot, together with the individual partners of the said firm of Simpson Brothers, Duff & Co., and J. A. & R. Simpson & Co., be made parties defendant to this bill, and be required to answer the same; that the whole amount due and owing of the said two last mentioned firms to the said firm of Dunham & Kearfoot, be attached for the benefit of complainants, and be held subject to the decree of the Court, that publication be made as to the non-resident defendants. Let the defendants of the firm of Simpson Brothers, Duff & Co., and J. A. & R. Smpson & Co., state the exact amount due from them to Dunham & Kearfoot, in their answer to this bill. Complainants further pray, that an account be taken, and that on the final hearing of the cause they may have a decree for the full amount of whatever may be due and owing from said firm to said Dunham & Kearfoot, and such other and further relief as shall seem meet and proper.

This is the first application for writ of injunction, and that they be enjoined from paying the same to said Dunham & Kearfoot, or any one else except under the order of this Court.

JNO. A. McKINNEY, *Sol.*

State of Tennessee, }
Knox County. }

Personally appeared before me, George M. White, an acting

Justice of the Peace for said county, John A. McKinney, as agent and attorney for Dall, Gibbons & Co., the complainants, and made oath, that the facts set out in the foregoing bill are true, to the best of his knowledge, information and belief.

JOHN A. McKINNEY.

Sworn to and subscribed before
me, a Justice of the Peace for
Knox County, April 2d, 1858.
GEORGE M. WHITE.

To the Clerk and Master of the Chancery Court at Rogersville:

Let a Writ of Attachment and Injunction issue, as prayed for in the foregoing bill, on complainants entering into bond and security as required by law.

S. J. W. LUCKY,
April 2, 1858. *Chancellor.*

Prosecution Bond.

Know all men by these presenss, that we, Austin Dall, D. P Gibbons, Joseph E. Dall, and John A. McKinney, are held and firmly bound unto Dunham & Kearfoot, in the sum of two hundred and fifty dollars, to be void on condition that the said Austin Dall, D. P. Gibbons and Joseph E. Dall, shall well and truly prosecute the suit this day commenced by them in the Chancery Court for the County of Hawkins, against the said Dunham & Kearfoot, or on failure thereof, shall pay all costs therein accrued, this 2d day of April, 1858.

DALL, GIBBONS & CO., [SEAL.]
By JOHN A. McKINNEY.
JOHN A. McKINNEY, [SEAL.]

Injunction Bond.

Know all men by these presents, that we, Austin Dall, D. P. Gibbons, Joseph E. Dall, and John A. McKinney, are held and firmly bound unto Dunham & Kearfoot, and to Simpson Brothers. Duff & Co., in the penal sum of twelve thousand eight hundred and thirty-eight dollars and forty-four cents, in which payment, well and truly to be made to the said Dunham & Kearfoot, we bind ourselves and each of our heirs, executors, administrators, jointly and severally, firmly by these presents, signed and sealed, and dated the 7th day of April, 1858. The condition of the above obligation is such, that whereas, the said Austin Dall, D. P. Gibbons, and Joseph E. Dall, on this day 7th April, filed a bill of injunction in the Chancery Court at Rogersville, against Simpson Brothers, Duff & Co., and the said Dunham & Kearfoot. Now, if the said A. B. Dall, D. P. Gibbons, and Joseph E. Dall,

merchants trading under the firm of Dall, Gibbons & Co., shall well and truly, and with effect, prosecute said bill of injunction or in case of failure so to prosecute the same, to pay and satisfy all costs and charges on the same: or if said injunction should be dismissed for the want of prosecution, or other cause, then if the said A. Dall, D. P. Gibbons and Joseph E. Dall, shall well and truly, do, perform and execute all such decree, or deror judgment, as the said Court of Chancery shall make or give in relation to said bill, or the matters therein contained, then the above obligation to be void, else to remain in full force and virtue.

AUSTIN DALL. [SEAL.]
DANIEL P. GIBBONS. [SEAL.]
JOSEPH E. DALL. [SEAL.]
By JOHN A. MCKINNEY,
JOHN A. MCKINNEY. [SEAL.]

Subpœna to Answer.

State of Tennessee.
To the Sheriff of Hawkins County, Greeting:

We command you to summons James K. Simpson, William Simpson, James M. Duff, James Sevier and Robert Simpson, to appear before the Judge of the Chancery Court, at a Court to be holden for the District composed of the Counties of Hawkins and Hancock, at the Court-House in Rogersville, on the fourth Monday of May next, then and there to answer a bill in equity filed against them and others, by Dall, Gibbons & Co., and further to do whatsoever may be decreed against them in the premises. Herein fail not, under the penalty prescribed by law, and have you then and there this writ. Witness, R. G. Fain, Clerk and Master of our said Court, at office in Rogersville, the fourth Monday of November, 1857.

R. G. FAIN.
Clerk and Master.

(Endorsed on the back as follows:)

Issued 8th day of April, 1858. Executed the within by summoning all of the defendants, and left a copy of the bill within-named with James K. Simpson, on the 11th day of April, 1858.

ELIAS BEAL,
Sheriff.

Subpœna to Answer.

State of Tennessee.
To the Sheriff of Hancock County, Greeting:

We command you to summons John A. Simpson, to appear before the Judge of the Chancery Court, at a Court to be holden for

the District composed of the Counties of Hawkins and Hancock, at the Court-House in Rogersville, on the fourth Monday of May next, then and there to answer a bill in equity filed against him and others, by Dall, Gibbons & Co., of the City of Baltimore, and further to do whatsoever may be decreed against them in the premises. Herein fail not, under the penalty prescribed by law, and have you then and there this writ. Witness, R. G. Fain, Clerk, &c., of our said Court, at office in Rogersville, the fourth Monday of November, 1857.

R. G. FAIN,
Clerk and Master.

(Endorsed on the back as follows:)

Issued 8th April, 1858. Came to hand 10th day of April, 1858.
S. WILLIAMS,
D. Sheriff.

And executed on the same day, and gave a copy of the bill at the same time, by me.

S. WILLIAMS,
D. Sheriff.

Writ of Attachment.

State of Tennessee. }
Chancery Court at Rogersville. }

To the Sheriff of Hawkins County, Greeting:

Whereas, Austin Dall, Daniel P. Gibbons and Joseph E. Dall, trading under the name and style of Dall, Gibbons & Co., of the City of Baltimore, have this day filed their bill in our said Court, *vs.* Dunham & Kearfoot, and others, of Baltimore, setting forth, amongst other things, that the said Dunham & Kearfoot are indebted to said complainants in the sum of six thousand four hundred and nineteen dollars and twenty-two cents; and also that the firm of Simpson, Brothers, Duff & Co., of Rogersville, and J. A. & R. Simpson, of Mooresburg, are indebted to said Dunham & Kearfoot in or about the sum of seventeen hundred dollars, for goods purchased, &c. And whereas, complainants have also obtained a judicial fiat, directing the issuance of an attachment in this case. These are, therefore, to command you, the Sheriff as aforesaid, that you attach the whole amount due and owing from the said firms of Messrs. Simpson to the said Dunham & Kearfoot, for the benefit of the complainants in this case, (the said Dall, Gibbons & Co.,) and to be held subject to the decree of this Honorable Court, and how you shall have executed this process, make known to our said Court, at a Court to be

held at the Court-house in Rogersville, on the fourth Monday of May next, and have you also then and there this writ.

Witness R. G. Fain, Clerk, &c., of our said Court, at office in Rogersville, the fourth Monday of November, 1857.

R. G. FAIN, *C. & M.*

(Endorsed on back as follows:) Issued 7th April, 1858. I have attached the said debts within named, according to the command of the within writ, in the hands of J. K. Simpson, James Sevier, James M. Duff and Wm. Simpson, R. Simpson of Mooresburg, this April the 10th, 1858.

ELIAS BEAL,
Sheriff.

Writ of Injunction.

State of Tennessee, }
In Chancery at Rogersville. }

To the Sheriff of Hawkins County, Greeting:

And James K. Simpson, William Simpson, James M. Duff and James Sevier, trading under the firm of Simpson, Brothers, Duff & Co., and Robert Simpson, of the firm of J. A. & R. Simpson, of Mooresburg. Whereas, Austin Dall, Daniel P. Gibbons, and Joseph E. Dall, partners in trade in the City of Baltimore, trading under the firm of Dall, Gibbons & Co., have this day filed their bill in our said Court *vs.* Dunham & Kearfoot, and others, setting forth, among other things, that said firm of Dunham & Kearfoot are justly indebted to said complainants in the sum of six thousand four hundred and nineteen dollars and twenty-two cents, and also, that the mercantile firm of Simpson, Brothers, Duff & Co., and J. A. & R. Simpson, are indebted to the said defendants in about the sum of seventeen hundred dollars, for goods purchased, &c. And whereas, complainants have also obtained a judicial fiat, directing the issuance of an injunction in this case. These are, therefore, to command you, the Sheriff as aforesaid, that you made known to the said James K. Simpson, William Simpson, James M. Duff, and James Sevier, of the firm of Simpson, Brothers, Duff & Co., and Robert Simpson, of the firm of John A. & R. Simpson, of Mooresburg, that they, their agents, &c., &c., are enjoined and inhibited under the penalty of a contempt of this Honorable Court, from paying over said sum of money to the said Dunham & Kearfoot, or any one else, until the further order of this Court, and how you shall have executed this process, make known to our said Court, at a court to be held

at the court-house in Rogersville, on the fourth Monday of May next, and have you also then and there this writ.

Witness R. G. Fain, Clerk, &c., of our said Court, at office in Rogersville, the fourth Monday of November, 1857.

R. G. FAIN, *C. & M.*

(Endorsed on the back as follows:) Issued 7th day of April, 1858. Executed the within by reading the within to all of the defendants, on the 10th day of April, 1858.

ELIAS BEAL,
Sheriff.

Answer of Defendants to the Bill.

The answer of James K. Simpson, James Sevier, William Simpson, James A. Simpson, Robert Simpson, James M. Duff, and William K. Reynolds, to the bill of complaint of Austin Dall, Daniel P. Gibbons, and Joseph E. Dall, filed against them and others in the Chancery Court at Rogersville.

These respondents, saving and reserving unto themselves the usual benefit of exceptions to the complainants' said bill for answer thereunto, say: It is true that they are partners in trade, and are the members of the several firms, the styles of which are set forth in the said bill. It is further true that they, as such, have been extensive dealers with their co-respondents, Dunham & Kearfoot, merchants of the city of Baltimore. It is further true that they have been in the habit of purchasing goods from their said co-respondents on the usual time, but have generally paid them punctually and without delay. It is further true that in the month of March, 1858, they were thus indebted to their said co-respondents in a large sum of money. But these respondents further answering, say: that on the 26th March, aforesaid, they remitted to their said co-respondents a large portion of their said indebtedness, and that by another remittance on or about the 1st day of April, 1858, they reduced their said liability to the sum of fifteen hundred dollars, for which amount they executed on the same day, to wit, on the 1st April, 1858, their promissory note to their said co-respondents, which said note was made payable at four months and executed in pursuance of a request made in the said month of March by their said co-respondents, to close up the account by note. This note was in full of all the balances due from respondents, and was mailed, together with the said last mentioned remittance, on the day it was executed. A few days thereafter these respondents received from their said co-respondents by mail a receipt dated April 5, 1858, for the said last named remittance, and the said promissory note in full settlement of account to that date. When said remittance and said note were forwarded these respondents were not informed of the

fact that any process had been issued, or that any bill had been filed. In fact the attachment, as respondents learn from the copy of the bill served upon them, was not awarded until the 2d April, 1858, and the bill not filed until the 7th April, 1858, and the attachment and injunction were not levied and made known until 7th April, 1858, their service of which was the first notice respondents had that they had been awarded.

These respondents further answering, say: that a short time after they forwarded the said note to their co-respondents, to wit, on the 6th day of April, 1858, the said note was for value in course of trade, negotiable by their said co-respondents to the Western Bank of Baltimore, of which fact of transfer these respondents were duly notified by a letter of that date from James Harvey, Esq., cashier of the said bank. These respondents are informed and believe that the said Western Bank of Baltimore obtained said note without any knowledge of the process having been awarded in this case, that no process had been made known to their co-respondents in any manner, and they are advised that they will be held liable for and bound to pay the said note to the said Western Bank of Baltimore. Under this state of facts these respondents are advised, that the complainants are not entitled to any relief against them, and they pray to be hence dismissed with their reasonable costs.

JAMES T. SHIELDS,
Sol. for Respondents.

Orders and Decrees.

May Term, 1858.

Dall, Gibbons & Co.
vs.
Dunham & Kearfoot and others.

In this cause, on motion of complainant's solicitor, judgment, pro confesso, is hereby entered as to defendants, Dunham & Kearfoot, and leave granted to complainants' solicitor to file an amended bill, making Western Bank of Baltimore a party.

May Term, 1859.

Dall, Gibbons & Co.
vs.
Dunham & Kearfoot, *et al.*
Final Decree.

This cause coming on to be finally heard this 25th day of May, 1859, before the Hon. Seth J. W. Lucky, Chancellor, &c., upon bill and answer and judgment pro. confesso, regularly taken and entered against Dunham & Kearfoot, and because it appears, to the satisfaction of the Chancellor, that there is no equity in com-

plainants' bill, the Court is pleased to order, adjudge and decree that the bill be dismissed, and that the complainants and John A. McKinney, their security in their prosecution bond, pay all the costs of this cause for which an execution may issue.

Copy of Rule Docket.

Bill filed, 7th April, 1858. Answer of James K. Simpson, filed, May 26, 1858, and attorney notified. On motion of complainants' solicitor and agent, and it appearing from the allegations of the bill which is sworn to, that the defendants, Dunham & Kearfoot are non-residents of the State of Tennessee, it is ordered by the master, that publication be made for four successive weeks in the Independent, notifying the said non-residents to appear at the next term of Court, and answer the said bill, or else it will be taken as confessed as to them, and set for hearing. ex-parte, April 14, 1858. (Publication made accordingly.

"The following is the affidavit of James K. Simpson, attached to his answer, which should have been copied immediately after said answer, but was omitted."

The State of Tennessee,
Hawkins County.

This day personally appeared before me, R. G. Fain, clerk and master of the Chancery Court, at Rogersville, James K. Simpson, who being duly sworn, according to law, on his oath, says, that the matters of fact stated in the foregoing answer are true, to the best of his knowledge, information and belief.

JAMES K. SIMPSON.

Sworn and subscribed before me, this 26th of May, 1858.

R. G. FAIN, *C. & M.*

State of Tennessee,
Hawkins County.

I, Richard G. Fain, Clerk and Master of the Chancery Court at Rogersville, do hereby certify that the above and foregoing is a full, true, and perfect transcript of the record and proceedings had in the case of Dall, Gibbons & Co. *vs.* Dunham & Kearfoot, and others, in our said Court, (except the bill of costs.)

Given under my hand, at office in Rogersville, this 21st day of May, 1860.

R. G. FAIN, *C. & M.*

Exhibit No. 8. (*Affidavit of J. K. Simpson.*)

Dall, Gibbons & Co.
vs.
Simpson, Brothers, Duff & Co.

James K. Simpson, one of the defendants, swears that he has ascertained since the trial of this cause, and since the adjournment of this Court, last evening, that the two notes recited in plaintiffs' declaration, and due as alleged, respectively, on the 13th and 25th March, 1858, were returned to plaintiffs, and that the same have been paid to plaintiffs by Dunham & Kearfoot. Altho' this view of the case was argued by affiant's counsel, from the evidence before the Court, the fact was not known to affiant till last evening, and he is confident that he will be able to prove the same on another trial.

JAMES K. SIMPSON.

Sworn to in open Court, this 26th
, 1860, before me.
N. GAMMON, *Clerk.*

Writ of Error.

United States of America:
The President of the United States.

To the Honorable the Judges of the Circuit Court of the United States, holden at Knoxville, for the District of East Tennessee, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in said Circuit Court, before you, between Austin Dall, Joseph E. Dall, and Daniel P. Gibbons and James K. Simpson, Robert Simpson, James Sevier, William Simpson, James M. Duff and William K. Reynolds, a manifest error hath happened, to the great damage of the said James K. Simpson, Robert Simpson, James Sevier, William Simpson, James M. Duff and William K. Reynolds, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause

further to be done therein to correct that error, what of right, and according to law and custom of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this, the 26th day of May, 1860, and in the 84th year of the Independence of the United States.

[SEAL.]

NATHAN GAMMON, *Clerk.*

Citation.

United States of America.

To Austin Dall, Joseph E. Dall and Daniel P. Gibbon, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States, at Knoxville, in the District of East Tennessee, wherein James K. Simpson, Robert Simpson, James Sevier, William Simpson, James M. Duff and Robert Reynolds, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable West H. Humphreys, Judge of the District Court of the United States, for the District of East Tennessee, and now sitting and holding the Circuit Court of the United States in said District, at Knoxville, on this, the 26th day of May, A. D. 1860.

[SEAL.]

WEST H. HUMPHREYS,
Judge of the District Court of the United States, for the District of East Tennessee, and now holding the Circuit Court for said District.

(Endorsed as follows:)

Came to hand, on 26th May, 1860, and executed same, by making known its contents to James R. Cocke, one of the attorneys for the defendants in error: also handing him copy of citation.

WM. M. LOWRY,
U. S. Marshal for Eastern Dist. of Tenn.

May 26th, 1860.

I, Nathan Gammon, Clerk of the Circuit Court of the United States, for the Eastern District of Tennessee, do hereby certify that the foregoing is a full, true, and perfect transcript of the record and all the proceedings had in said circuit, for the Eastern District of Tennessee, at Knoxville, in the case of Dall, Gibbon & Co. *vs.* Simpson Brothers, Duff & Co., except the Bill of costs.

Given under my hand, at office, in Knoxville, to which [SEAL.] is hereunto attached the seal of said Court, this, the 23d day of August, A. D. 1860.

NATHAN GAMMON, *Clerk.*
U. S. Circuit Court, Eastern Dist. of Tenn.

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Supreme Court of the United States.

DECEMBER TERM, 1865.

JAMES K. SIMPSON, ROBERT SIMPSON, JAMES SEVIER, WILLIAM SIMPSON, JAMES M. DUFF, and WILLIAM K. REYNOLDS.

vs.

AUSTIN DALL, JOSEPH E. DALL, and DANIEL P. GIBBON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

STATEMENT OF FACTS.

Austin Dall, Joseph E. Dall, and Daniel P. Gibbon, partners, trading under the firm, name, and style of Dall, Gibbon & Co., instituted their suit in the circuit court of the United States for the eastern district of Tennessee, on the 12th day of April, 1859, against James K. Simpson, Robert Simpson, James Sevier, William Simpson, James M. Duff, and William K. Reynolds, partners, under the firm and style of Simpson, Brothers, Duff & Co., requiring them to answer, in a plea of trespass on the case, to their damage seven thousand dollars.

In their declaration the plaintiffs, Dall, Gibbon & Co., allege that in the spring of 1858 they held on a firm in Baltimore, known and designated as Dunham & Kerefoot, four promissory notes; one for $1,643 40, due March 13, 1858:

another for $1,710 22, due March 25, 1858; another for $2,194 30, due May 25, 1858; and the other for $840 90, due June 2, 1858; and a small account for $30, due June 15, 1858; and that the firm of Simpson, Brothers, Duff & Co., were indebted to the firm of Dunham & Kerefoot in a large sum, say $7,000; that firm of Dunham & Kerefoot were in "failing circumstances;" that they, Dall, Gibbon & Co., inclosed the above described notes and accounts by letter to Theo. Allen Jones, an attorney at law, residing at Rogersville, Tennessee, with instructions to sue out an attachment in chancery, and attach in the hands of Simpson, Brothers, Duff & Co., whatever amount they might be owing to Dunham & Kerefoot, to secure the alleged indebtedness due from Dunham & Kerefoot to them; that this letter was taken from the post office at Rogersville by James M. Duff, a member of the firm of Simpson, Brothers, Duff & Co., and, without any authority for so doing, opened and read; and that after said letter was thus read and a knowledge of their contents thus "illegally, wrongfully, and fraudulently acquired," the same was communicated by James M. Duff to the other members of the firm; and that the said firm of Simpson, Brothers, Duff & Co., "wrongfully, illegally, and fraudulently" detained the said letters in their possession, and "wrongfully, illegally, and fraudulently failed to forward or to deliver the same to the said Theo. Allen Jones, to whom they were directed, for the space of eight days, with the purpose, design, and intention of preventing them from obtaining payment of the said notes and accounts, which Dunham & Kerefoot was owing them, and for the purpose of favoring the said Dunham & Kerefoot;" and that during the time they thus kept possession of said letter, with the alleged illegal and wrongful design, they "fraudulently, illegally, and wrongfully" paid a large part of their indebtedness to Dunham & Kerefoot, and executed their note for the remainder, and "wrongfully, illegally, and fraudulently" forwarded the said note to Dunham & Kerefoot, who negotiated the same. "By means of which tortious acts and grievances, and by reason of the insolvency and bankruptcy of the said Dunham & Kerefoot, which occurred in a short time thereafter, they allege that they have lost the whole amount of the said notes and accounts."

There are several counts to the declaration, but the substantial facts as alleged in all of them, as well as of the "causes of action," are hereinbefore fully stated.

See pages 5, 6, 7, 8, 9, and 10 of the Record.

The defendants plead the "general issue," on which the cause was tried.

See page 11 of the Record

BRIEF.

On behalf of the appellants we insist—

I. That the court below erred in permitting parol evidence of the contents of the two letters, alleged to have been written by the plaintiffs below to Theo. Allen Jones—and the "illegal opening and reading of which," and "their illegal and fraudulent detention" by James M. Duff, is the foundation of the action—to go to the jury; no sufficient evidence of their loss having been made justifying such action on the part of the court.

1 Greenleaf on Ev., sect. 557, *et seq.*

See pages 16 and 17 of the Record for the testimony and action of the court.

II. That the court below erred in its charge to the jury when the court charged—

See page 21 of the Record.

"That if the *defendants* were about to remove their property beyond the limits of the State the plaintiffs would have had the right to attach such property; that indebtedness by defendants to Dunham & Kerefoot was property within the meaning of the statutes of Tennessee; that if the defendants by arrangement with insolvent creditors intended to pay portions of their debt, and convert other parts into negotiable securities, so as to defeat the power of the plaintiffs to collect their debts from such insolvent non-resident creditors who were plaintiffs' debtors, such conduct would amount to a removal of the property from the limits of the State; and if such measures were in contemplation, the plaintiffs would have a right to attach such indebtedness to prevent its removal and secure their debt."

Now, we insist that so far as *any claim* is proven in this record, on behalf of the plaintiffs below, as against the defendants below, this charge is clearly erroneous, when it states "that if the defendants were about to remove their property beyond the limits of the State, the plaintiffs would have had the *right* to attach such property."

What rights had the plaintiffs below, as against the defendants, in March, 1858. They were not creditors of the

defendants. They held no valid claim of any kind against the person or property of the defendants. Why could not the defendants do as they please with their property? Why are they required by the court, in its charge to the jury, to procure the consent of the plaintiffs, before they can do as they please with their property?

It seems to us that the mere statement of the proposition is enough to refute its legal correctness.

The attachment laws, as they existed in the State of Tennessee, will be found collected and enacted in the Code of Tennessee, pages 630, *et seq.*; and in every section of the act the court will see that the relation of creditor and debtor must exist, and that it is either the "absence of the debtor from the State, as a non-resident," when the creditor's debt is due, or his "fraudulent removal of himself or his property from the State," whether the debt is due or not, that authorizes the issuance of an attachment.

Hence, it follows that no conduct on the part of the defendants below in regard to the debt, which they were owing Dunham & Kerefoot, would authorize the issuance of an attachment—in the absence of an alleged fraudulent intent on the part of Dunham & Kerefoot—unless the debt owing by Dunham & Kerefoot to Dall, Gibbon & Co., was actually due, and a "cause of action" had accrued.

Nothing of this kind is found in his Honor's charge to the jury. It is assumed by him that it does not matter whether at the time Dall, Gibbon & Co. had a cause of action against Dunham & Kerefoot or not, or whether Dunham & Kerefoot were acting in good faith or not—the whole cause is made to turn, and the right to issue the attachment depend on the conduct of Simpson, Brothers, Duff & Co., when the plaintiffs below could have no semblance of a right to an attachment for the security of their indebtedness, as against Simpson, Brothers, Duff & Co., only through the "fraudulent conduct" of Dunham & Kerefoot connected with their non-residence; and yet nothing is said in the charge as to the *bona fides* of Dunham & Kerefoot, who were then doing business in the city of Baltimore, where the plaintiffs below resided.

Equally erroneous we insist is that part of the charge which states:

"That the indebtedness by defendants to Dunham & Kerefoot was property within the meaning of the statutes of Tennessee, and any arrangement on their part to pay said indebtedness to their insolvent creditors, so as to defeat

the power of the plaintiffs to collect their debts from such insolvent creditors, would amount to a removal; and if in contemplation, the plaintiffs would have the right to attach such indebtedness, to prevent its removal."

We insist—

I. That the payment of a debt by a debtor to his creditor, before the rights of any creditor of his creditor has attached or cause of action has accrued—regardless of the motive that influenced the debtor to pay—would not justify the issuance of an attachment, because it would effectually destroy credit and commerce.

II. That the statutes affording the extraordinary writ of attachment must be understood to apply to property which the creditor might have supposed would not be carried out of the State, and to which he might have looked for his security at the time of contracting the indebtedness, and it is unreasonable to extend it to a species of property which, from its nature and destination, must necessarily be taken out of the State, and which the creditor would not have believed would remain within its limits.

Russell *vs.* Wilson, 18 Louisiana, 367.

The language of the Louisiana statute being identical with the statutes of Tennessee.

III. That an attachment will not be sustained, founded on the allegation of the "mere removal of property," but the allegation must be, "that the removal will be to the injury of the creditor;" and that its provisions should not be so understood as to interrupt or discourage the commerce of the country, or to enable one creditor to seize and appropriate to the satisfaction of his debt the effects of an honest, but embarrassed and struggling debtor, to the exclusion of all others. And such are the decisions in—

White *vs.* Wilson, 10 Illinois, 71.

Ridgway *vs.* Smith, 17 Illinois, 33.

IV. The court of Tennessee held, in Runyan *vs.* Morgan, (7 Humph., 210,) that an attachment could not be sustained which was issued on the allegation that the defendant was about to remove a "particular piece or part of his property" beyond the limit of the State, and yet the judge, in this case, charges the jury that the payment of an existing debt, or the contemplated payment of an *existing debt* by a debtor in

Tennessee to a creditor in Maryland, would authorize the creditors of the creditor in Maryland, residing in the same State, to sue out an attachment in Tennessee on a claim not yet due, and attach the indebtedness in the hands of the debtor in Tennessee. Surely such cannot be the law.

Drake on attachment, sects. 69. 87

III. Again, we insist that his Honor erred in his second proposition as to the effect of obtaining the letter and opening it, and that he should have stated, from the proof as shown on pages 18, 19, that such consequences would follow, "unless the jury was satisfied from the proof "that it was the intention of Dall, Gibbon & Co., the plaintiffs, that the contents of the letters were to be shown by Theo. Allen Jones to the defendants, Simpson, Brothers, Duff & Co."

Surely no wrong could follow from the *manner* in which the information was obtained, when it was intended by the parties complaining that the information was to be communicated to the defendents.

IV. And we cannot agree with his Honor in the third proposition. It is manifest, we think, that from the proof in the case the charge is erroneous. The court should have stated that if the debts of the plaintiffs against Dunham & Kerefoot, which were due at the time the alleged wrong was done, have been paid, no injury resulted to the plaintiffs; and that act, although illegal, was *damnum absque injuria*."

Nothing was said by the court to the jury in relation to whether the indebtedness of Dunham & Kerefoot was due or not at the time of the alleged wrongs, and for this error we think the cause should be reversed and remanded.

V. There is no proof in the record implicating any of the defendants in the alleged wrong, except as to J. M. Duff and James K. Simpson, and yet the jury find a verdict against *all* of the defendants, and we think without any evidence, either positive or circumstantial, as to defendants Robert Simpson, James Sevier, William Simpson, and William K. Reynolds.

ARGUMENT.

May it please the Court:

It will be seen by reference to the evidence adduced on trial, that the letter referred to as having been written and addressed to Mr. Jones, inclosing notes and directing suit, was written on the 16th of March, 1858, and contained *only two of the notes* mentioned in the declaration. In another letter written on the succeeding day there was, as the witnesses remember, a statement of accounts between Dall, Gibbon & Co. and Dunham & Kerefoot; but their recollections on this point are very meagre and unsatisfactory. They could neither inform the court of the contents of the letter, nor the amount of the debts called for in the statement inclosed. This much, however, does appear, only two notes were transmitted to Jones to be put in suit; one of these was *due at the time it was sent*, and the other would fall due *shortly thereafter*. This testimony points unmistakably to the two notes first maturing. Every other fact and circumstance in the case tends to confirm this conclusion. The holders then had an unmistakable right of action on one, and would have a clear right of action on the other by the time the letter containing them reached its destination.

But it was not so as to the others which were not due. Hence, all were not sent. Dunham & Kerefoot had suspended; they were in failing circumstances. Dall, Gibbon & Co., were so far alarmed because of the insecurity of their debts as to abandon the courts of Maryland, where both parties resided, in order to seek redress in Tennessee. Why, then, in this state of anxiety to secure a doubtful debt, did they not send forward all the notes for suit? Simply because they were not all due. This is a fact almost too plain for controversy. Notwithstanding the witnesses examined (W. E. Cocke, who wrote the letter, and Jones, who received it) refused to say so. Their memories were imperfect, and their testimony on this point wanting in clearness and precision.

Now, the letters themselves were the best evidence of their contents, and would have conclusively settled this disputed and material fact. The well-settled rules of evidence, as well as justice to the parties in this cause, demanded their production. These letters constitute the very foundation of this action; were so regarded by the plaintiffs in error in the court below; and by their counsel retained to prosecute

this suit—the declaration being as they allege—predicated upon them, and they had and held these letters to be used as evidence on the trial. But they were not produced. Had they been before the jury, as is most earnestly insisted for the plaintiffs in error, they would have manifested beyond cavil that the two notes, due on the 13th and 25th of March, *only*, were sent out to Jones for collection. These were not in evidence on the trial. They had, as we are authorized to believe from their non-production, been paid by Dunham & Kerefoot to Dall, Gibbon & Co., after the institution of this suit and before the trial. In this event no recovery ought to have been had; for if the plaintiffs in error had obstructed or delayed defendants in error in the prosecution of an attachment bill, the hinderance effected them only as to the two notes first falling due; and these being subsequently fully paid and discharged by Dunham & Kerefoot, no injury was inflicted on them, or if there was, it did not authorize a recovery for the loss of other debts not contained in these letters, and as to which no delay was caused by anything done by the plaintiffs in error.

As the written directions contained in the two letters of the 16th and 17th of March, 1858, written by the witness, W. E. Cocke, in behalf of the defendants in error, to Jones, became so material to the ascertainment of the rights of the parties on the trial of this cause; and as the defendants in error alone had an interest in confusing the evidence on this part of the case, which was successfully effected by the absence of said letters, and the imperfections of the memories of the witnesses called to prove their contents; the most satisfactory proof of their loss, according to all the authorities, ought to have been required before admitting parol evidence of their contents.

An attempt was made to account for their absence so as to let in this secondary evidence. Mr. Jones states that a few days before the trial he looked over his papers in Florence, Alabama, for such documents as related to this case, and that these letters "*were not among his papers.*" The witness recollected that *he thought about the two letters* when he was looking over his papers, but being under the impression that *when the declaration was filed* he had left the letters with Mr. Cocke, he made no *special search* for them more than for the other papers. Mr. Cocke, counsel for the defendants in error, was then examined, and said that he had had the letters when he drew the declaration in this case, but was (at the time of deposing) under the impression that he had

returned them to the witness Jones. He had not examined his files of letters before the commencement of this term of Court; in getting his papers together for the trial he had not found these letters, and not finding them among the other papers in his possession he suppose the witness Jones had them. Upon this evidence of their loss, the court allowed the defendants in error to give parol evidence of their contents, and to this ruling of the court the plaintiffs in error excepted. The testimony of the loss of these letters is most artfully and ingeniously stated, but when studied and analyzed proves nothing whatever. Neither of these witnesses say that the letters were lost or that they believed them to be lost, or beyond the reach of the defendants in error. Both of these witnesses, attorney for the plaintiff below, regard these letters as important testimony, and for this purpose these letters were carefully preserved. Both think of them when they were respectively looking over their papers. Why? Because of their importance as evidence on trial. But, while both were impressed with their importance, neither exhibited due diligence in searching for them. Jones looked over his papers, not for these letters, as he informs us; for at that time he was under the *impression that when the declaration was filed* he had left the letters with Mr. Cocke, and these letters were not *among his papers*. The witness does not state that he believed, when deposing, that the letters were then in Mr. Cocke's possession, or that he believed, *at the time he looked over his papers*, that they were in Mr. Cocke's possession; not at all, but that he was under the impression that he had left them with Mr. Cocke when he was drawing the declaration. This may be and doubtless is true, and still is not inconsistent with Mr. Cocke's impression that he had returned them to Jones; for it may well be that they were left with Mr. Cocke while drawing the declaration, and afterwards, according to Cocke's recollection, returned to Jones. So with Jones' assertion that these letters were *not among his papers*. This may be true; but does this sufficiently negative the idea that they were not in his possession or under his control? Cocke believed that he returned them to him; does Jones pretend otherwise? Does he say they were not in his possession, or that he believed them accessible to him? For all that appears these letters may have been returned to his client or they may have been in his possession, *though not among his papers*, or they may have been in the possession of Mr. Cocke, or in their proper file in Mr. Cocke's office.

In questions of this character no precise rule can be laid down as applicable to all cases. Every case to some extent must be left to be determined on its own peculiar circumstances, and in the decision of which courts are accustomed to scrutinize the motives of parties and witnesses, who, as in this case, take benefit by the non-production of written evidence and require satisfactory evidence of the loss of the papers, and the good faith of the party relying on them, before admitting secondary evidence of their contents; and to this end all the collateral facts and circumstances will be considered. Following up this train of thought, and calling to our aid the collateral facts and circumstances, it will be seen that although Jones thinks of the letters, when arranging his papers for the trial, he makes no special search for them; and notwithstanding his impression that he has left them with his associate counsel, Mr. Cocke, he makes no inquiries of him for these letters, nor does he urge a more thorough search for them among the papers of his office; nor does either of the witnesses attempt to refresh his memory, as to their contents, by reference to any other paper or memorandum relating to the case. From the usual course of merchants in the transaction of business, it is fair to presume that copies of these letters were retained. If no copy has been retained, their receipt must have been acknowledged by Mr. Jones. His answer would most likely have contained a statement or receipt showing the dates and amounts of the two notes inclosed; and although he knew that these particulars would become important inquiries on the trial: that the result would depend on his recollection of these facts; that his *impressions* were not clear, he never thought of aiding his memory by reference to any one of these sources of information.

The same remarkable indifference characterizes Mr. Cocke's action in the premises. He examined his papers preparatory to the trial, and this examination disclosed to him the fact that these important letters were not among them. He thinks he returned them to Jones, who then resided in Alabama, and with this thought he is content, and makes no farther examination of his office, nor does he write to Mr. Jones requesting him to bring them with him. And when he learns from Jones, as he must have done, that he had not brought these letters with him, he is not moved to another search, but is content to come into court, and say that while preparing his papers for this trial he had not found these letters, and that he had made no particular search for

them, because of his impression that he had returned them to Jones.

Proof more inconclusive and indefinite could not be framed by the art of man than that relied on to show the loss of these papers, (letters.) It is wanting in all the elements of certainty, and utterly fails to satisfy the mind that these papers are lost; and if we have not mistaken the rules of law applicable to this case, the admission of secondary evidence by the court below to prove the contents of these letters, was erroneous, and entitles the plaintiffs in error to a new trial. The rule itself is founded in good sense, and has been approved by the observation and experience of the first jurists of England and America, and this Court is called on to enforce it in this instance, as well for its wisdom and utility as for its just operation in this particular cause.

The production of these letters, or copies of them or the receipt returned by Jones for the notes which they contained, would have wiped away the uncertainty growing out of the want of recollection or *clearness* on the part of the witnesses, as to the two notes sent in them, and show that the notes forwarded were the notes falling due on the 13th and 25th of March. If so, and all the other facts alleged are true, no injury has been sustained by defendants in error.

Even admitting that they were delayed in the prosecution of their attachment bill, it affected them alone, as to the two first notes; which were not produced or shown in evidence on the trial; and the wrongs imputed to plaintiffs in error, however they may be viewed by the court, will not authorize a recovery for debts which were not then due and suable, and which had not been sent for collection in either of the letters alleged to have been detained. But suppose that we admit that the notes falling due on the 25th of May and 2d of June—the notes offered in evidence on the trial of this cause—were the notes inclosed by Cocke in his letters of the 10th of March to Jones for collection, the defendants in error will not be aided thereby. The letters containing the notes sent reached Jones on the 1st of April. He was in Tennessee, and in a position to sue on the 2d of April.

But these notes were not then due; the holders had then no right of action; and under the pleadings and evidence in this cause, an attachment bill could not have been maintained. The attachment law, as it then existed, will be found collated and enacted in the "Code of Tennessee," at page 636 and following pages. Under the several statutes,

digested and grouped together in the "Code," attachments are authorized in some instances upon debts and demands *not due*, but this, as we have already said, could not have been under the facts of this case. An attachment is given "when the defendant is about to remove or has removed himself or his property from the State," but the law contemplates no such case as the one before the court. Let us see what the parties against whom this attachment is directed on debts not due were doing or about to do. They were merchants doing business in Baltimore. They had extended credit to numerous customers in various States, and, among others, to the plaintiffs in error in the usual course of their business. In the spring of 1858 they suspended prompt payments. They owed largely, and had many debts owing them. In this condition of things, as honest men, it became their duty to collect in their assets and apply the same to the payment of debts they owed others; that they were doing so, is manifested by the confidence reposed in them by their creditors, as shown by the evidence of the witness Bartelow, and confirmed by the absence of all contervening proof. So they were withdrawing, in the usual course of business, debts due them in Tennessee, to apply to payment of their own debts, in such order as they deemed just and proper, and on this state of facts the defendants in error insist they had the right to leave Maryland and attach in Tennessee, for the security or satisfaction of debts not due. To uphold such a construction would be an entire perversion of the law. Instead of facilitating the business of the country, as the legislature intended it to do, the act would be capable of obstructing, in a high degree, the legitimate operations of commerce. It is not every intention to remove property from the States that will entitle a creditor to attach before his debt is due. Were it otherwise, every article of produce bought up to be sent forward to markets outside of Tennessee would subject the owner to an attachment for all his debts, whether due or not due. For instance, one buys a lot of cotton at Memphis, to be shipped to New Orleans or New York. It is his purpose to "remove it from the State," but can it be said, that because of this intent, to send his cotton forward in the usual course of trade to a foreign market, that creditors are authorized to attach for debts due at one, two, five, or ten years from that time? If so, creditors would have it in their power to hinder the operations of trade, and force, in many instances a premature payment of their debts: for there are none who

do not at intervals purpose "removing their property from the State."

A mere intention to visit a friend or relation in an adjoining State, by one's self or by some member of his family, usually implies an intent to remove some part of his property out of the State, as in most instances a portion of his property becomes indispensable for the effectuation of his purpose, as a family carriage; but no one ever supposed that this would authorize an attachment on debts either due or not due. The question before us affords little ground for disputation as the cases supposed above. Dunham & Kerefoot intended, no doubt, in the ordinary way, and as it might be convenient, for Simpson, Brothers, Duff & Co. to pay the amount owing by them. This it was their right and duty to do; and the doing of it, or the intention of doing it, afforded no ground for an attachment against them or those not yet due. No adjudication of the courts of Tennessee can be cited in confirmation of such a claim, and the reasons in opposition to such a construction of the statutes on this subject are too numerous and apparent to demand any further argument from us in repetition of it. No authorities outside of the statutes itself can be cited to aid the court, for the reason, as we insist, that the proposition is so manifestly untenable that it has never before been insisted upon, and, consequently, there are no adjudications on the point.

But to the foregoing argument the defendants in error may reply that the court charged the jury "that if the defendants, by arrangement with insolvent creditors, intended to pay portions of their debts, and convert other parts into negotiable securities, so as to defeat the power of the plaintiffs to collect their debts from such insolvent non-resident creditors who were plaintiffs' debtors, such a conduct would amount to a removal of property from the limits of the State; and if such means were in contemplation, the plaintiffs would have the right to attach such indebtedness to prevent its removal and to secure the debts."

Now, waiving all criticisms to that portion of his Honor's charge quoted above, "that such conduct would amount to a removal of the property from the limits of the State," we insist, first, that there is no foundation in the pleadings for such instruction to the jury. It was entirely gratuitous and unauthorized—submitting to them a question which the plaintiffs below had not presented.

In presenting their cause, inasmuch as the plaintiffs below

complained that they had been defeated in a right to sue for the collection of their debts, it was essential to the maintenance of their action that they should then try their action; for it is plain that if they had no right of action on the two notes shown in evidence in this cause, that they could not be hindered, delayed, nor defeated in the prosecution of such a right. The necessity of such an arrangement was felt by the pleader who attempts to place his client in such an attitude before the court. But he does not allege the insolvency of Dunham & Kerefoot, nor does he allege any collusion between Dunham & Kerefoot and the plaintiff in error; nor that either of them was about to move the property of Dunham & Kerefoot out of the State. No such allegations are made. The grounds assumed by defendants in error in their declaration is that Dunham & Kerefoot were *non-residents* of the State of Tennessee; that they were in *failing circumstances*, and that plaintiffs in error wrongfully, &c., obtained a knowledge of their purpose to attach, and that they wrongfully, &c., paid the debt which they owed to Dunham & Kerefoot. His Honor ought, therefore, to have confined his instructions to the jury to the case made by the plaintiff's declaration. He had no right to go beyond this and suggest collusion and a dishonest purpose to remove the fund out of the State, "so as to defeat the power of the plaintiffs to collect their debts," by instructing the jury on questions having no foundation in the pleading. It would be destructive of the rights of men as well as a violation of the principle for courts to allow this to be done. When parties have assumed distinct grounds in the main statement of their cause of action, they should be confined within the limits they thus assign themselves. Had they, in this case, alleged insolvency, collusion, and a purpose to remove this fund, the plaintiffs in error could have prepared to repel the charge. But no such ground is assumed either in the pleadings or in the evidence. Plaintiffs' right to a recovery is placed distinctly on other and different grounds Yet the court, in its charge to the jury, steps aside from the case made by the parties, and suggests new grounds on which a recovery can be had, and upon it a verdict is rendered. No such practice should be tolerated by this enlightened Court.

But a third objection to this part of his Honor's charge to the jury, will be found in the fact that there was no ground to base it upon. Dunham & Kerefoot, according to the evidence, were not insolvent at the time these notes were sent

out to Jones to be put in suit. The plaintiffs don't allege or attempt to prove this. The declaration alleges that they were then in failing circumstances, and the witness states that they had suspended, and afterwards, two months or more, became insolvent. Nor is there any proof tending, by any sort of strained inference whatever, to show collusion between plaintiffs in error and Dunham & Kerefoot to withdraw the fund sought to be attached from Tennessee, to defeat the plaintiffs in the collection of their debt. On the contrary, it is perfectly manifest that Dunham & Kerefoot knew nothing about what was going on. It was a voluntary and praiseworthy effort on the part of Simpson Brothers, Duff & Co., to pay their indebtedness to Dunham & Kerefoot, and in this way save them the trouble, loss, and delay which would have arisen from an attachment bill, in case one had intercepted the fund. And this was not done for the purpose of aiding Dunham & Kerefoot in cheating or defrauding creditors.

EDMUND COOPER, *Attorney.*

Supreme Court of the United States.

No. December Term, 1865.

JAMES K. SIMPSON AND OTHERS
vs.
AUSTIN DALL AND OTHERS. } IN ERROR.

ABSTRACT AND BRIEF FOR DEFENDANTS IN ERROR.

Joseph L. Pearson, printer, 511 Ninth street.

Supreme Court of the United States.

No. , December Term, 1865.

James K. Simpson and others
vs.
Austin Dall and others.
In Error.

Abstract and Brief for Defendants in Error.

STATEMENT OF CASE.

This is an action of trespass on the case in tort, brought by the defendants in error against the plaintiffs in error, in the Circuit Court for the Eastern District of Tennessee.

Judgment was rendered in favor of plaintiffs below, (defendants here,) May 25, 1860, and writ of error prosecuted by defendants below.

The defendants in error were a mercantile firm, doing business in Baltimore, Md., and plaintiffs in error a firm doing business in Rogersville, Tennessee.

Dunham & Kearfoot were partners in business in Baltimore, to whom the plaintiffs in error were largely

indebted, and they, Dunham & Kearfoot, were, at the same time, largely indebted to the defendants in error.

Dunham & Kearfoot were in failing circumstances, and in March, 1858, suspended payment. At that time their aggregate indebtedness to defendants in error was $\$6,419\frac{22}{100}$.—See Record, 25. And the indebteness of plaintiffs in error to Dunham & Kearfoot was about $5,100.—See Record, 20.

On the 16th and 17th March, 1858, the defendants in error caused letters to be written to their attorney at Rogersville, Tenn., enclosing two notes, and a statement of the entire indebtedness of Dunham & Kearfoot to them, and directing him to attach the indebtedness of plaintiffs in error to Dunham & Kearfoot to secure the debt due from said Dunham & Kearfoot to them, defendants in error.—See Record, 17, and testimony of Wm. E. Cocke, jr., 19.

These letters were taken from the post office in Rogersville, Tenn., by one of the plaintiffs in error, and opened and read, and detained for some days from the attorney to whom they were addressed.—See Record, 18, 23.

After opening and reading the letters directing the debt due from them to Dunham & Kearfoot to be attached, and before an attachment could be sued out, the plaintiffs in error remitted to Dunham & Kearfoot, at Baltimore, in money, drafts and notes, $5,100, being the whole amount they were owing them, and thus defeated the intended attachment in favor of the defendants in error, whereby they failed to collect their debt from Dunham & Kearfoot.

Record, 18, 20.

BRIEF.

1. The defendants in error had a right, under the laws of Tennessee, to attach, in the hands of the plaintiffs in error, the debt due from them to Dunham & Kearfoot,

and to attach for that portion of their debt which was not due as well as for that which was.—Supplement to laws of Tenn., 1846, p. 11, § 1.

Laws of Tenn., 1855–6, p. 56.

The term "property" includes lands and tenements, money, goods and chattels, things in action, evidences of debt, &c.—2 B. C., 396–7, 442.

Code of Tenn., p. 79, § 51.

The right of defendants in error to attach the debt due from plaintiffs in error to Dunham & Kearfoot was defeated by the wrongful act of the plaintiffs in error.

The detaining and opening of the letters, and thus obstructing free communication between defendants in error and their attorney, and availing themselves of information thus acquired to defeat the right of defendants in error to attach the assets of Dunham & Kearfoot in the hands of the plaintiffs in error, was a wrongful and illegal act by statute and at common law, injurious to the defendants in error, for which they are entitled to redress by action on the case.

2. There are no errors assigned on the record in this case.

And the only question saved during the progress of the trial was upon the ruling of the court below permitting the defendants in error to fill up the endorsements on two promissory notes after the trial had commenced.

I will not stop to sustain by argument a practice so universal and unobjectionable. I know of no case in which the propriety of the practice has been questioned. The notes were read in evidence without objection. And they were properly admitted, even if they had been objected to. They were for part of the debt owing by Dunham & Kearfoot to defendants in error, when they directed the proceeding by attachment to be commenced;

and for the payment of which they had a right to attach the debt due from plaintiffs in error to Dunham & Kearfoot. If they have a right to maintain this action at all, the notes were properly admitted in evidence.

But they went to the jury without objection, and no question can now be raised upon them.

3. The counsel for plaintiffs in error has also raised, in argument, a question upon the ruling of the court in admitting secondary evidence of the contents of two letters.

No general rule can be laid down upon this subject, applicable alike to all cases. Each case must depend, essentially, upon its own circumstances.

The proof necessary to establish the loss of a writing, so as to let in secondary evidence of its contents, must depend upon the nature of the transaction to which it relates, its apparent value, and other circumstances. If suspicion hangs over it, and there is any reason to believe that it is designedly withheld, a rigid enquiry should be made into the reason of its non-production; but if there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original—in respect to which the courts extend great liberality.

Williams vs. The United States, 1 How., 299.
De Lane et als. vs. Moore et als., 14 How., 265.
Juzan et als. vs. Toulmin et als., 9 Ala., 663.
Jones et als. vs. Scott, 2 Ala., 61.

In this case, the search for the originals might have been more thorough and rigid; but reasonable diligence was used, and there is no reason to suspect they were intentionally withheld.

4. But however this may be, the evidence of their contents was given to the jury without objection, and the question of its admissibility cannot now be raised here.

The trial commenced on the 23d of May, and terminated in judgment on the 25th. On the 26th a motion

for new trial was argued and overruled, and a bill of exceptions to the decision of the court overruling the motion for new trial was tendered, allowed, and filed.

In this bill the plaintiffs in error say they *except* to the decision of the court admitting secondary evidence of the contents of the letters; but no exception was taken when the decision was made, and the trial progressing; and it cannot, therefore, be availed of here.

It is a well settled principle that no bill of exceptions is valid which is not for matter excepted to at the trial. The original authority under which bills of exception are allowed has always been considered to be restricted to matters of exception taken pending the trial and ascertained before the verdict. It need not be drawn out and signed before the jury retire, but it must be taken in open court, and must appear by the certificate of the judge, who authenticates it, to have been so taken.

Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice. For if it be brought to the attention of the court that one of the parties excepts to his opinion, he has an opportunity of reconsidering or explaining it more fully to the jury.

Walton vs. the United States, 9 Wheat., 651.
Shepherd et als. vs. Wilson, 6 How., 275.
Phelps vs. Mayer, 15 How., 161.

5. The counsel for plaintiffs in error has also argued upon the instructions of the court.

They were substantially right. Taken as a whole they presented the case fairly on both sides, and could not have misled the jury as to the issues they were to try, or the principles by which they were to be governed.

But it is a sufficient answer to say that no exception was taken to them when given, and this court will not review them.

BROWNING & EWING,
For Defendants in Error.